IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-428

SHEARN MOODY, Jr.,

Petitioner,

VS.

STATE OF ALABAMA, EX. REL. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE CO., OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

FRANK G. NEWMAN
NEWMAN, SHOOK & NEWMAN
A Professional Corporation
4330 Republic National Bank Tower
Dallas, Texas 75201

MARTIN PAUL SOLOMON
286 5th Avenue
New York, New York 10001

Attorneys for Petitioner
SHEARN MOODY, JR.

Subject Index

TABLE OF AUTHORITIES

CASES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO._____

SHEARN MOODY, JR.,

Petitioner,

VS.

STATE OF ALABAMA, EX. REL. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE CO., OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner Shearn Moody, Jr. respectfully prays that a writ of Certiorari issue to review the judgment of the Supreme Court of the State of Alabama entered on February 11, 1977, affirming the orders of the Trial Court granting the Domiciliary Receiver of Empire Life Insurance Company of America the authority to proceed with the liquidation and reinsurance of Empire, and granting the Domiciliary Receiver the authority to

execute an Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance proposed by Intervenor Protective Life Insurance Company with regard to Empire.

This case involves important questions as to the constitutional propriety of the approval of a Treaty of Assumption and Bulk Reinsurance which arbitrarily discriminates between Empire's policyholders, stockholders and creditors who are similarly situated and accordingly denies them the equal protection of the laws guaranteed by the Fourteenth Amendment, the approval of an Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance without providing all of Empire's policyholders, stockholders and creditors with prior notice or an opportunity for a hearing at which to raise objections to the same, contrary to the due process clause of the Fourteenth Amendment, and an adjudication of insolvency premised upon the retroactive application of a state insurance statute governing the valuation of admitted assets.

OPINIONS BELOW

The opinion of the Alabama Supreme Court affirming the judgments of the Trial Court is reported at *Moody vs. State ex. rel. Payne, Commissioner, Alabama*, 344 So.2d 160 (February 11, 1977). (See Appendix p.A-1). A true and correct copy of the order of the Alabama Supreme Court denying the Petitioner's timely Application for Rehearing appears in the Appendix, p. A-10.

JURISDICTION

The Alabama Supreme Court entered its judgment on February 11, 1977. The Alabama Supreme Court denied the Petitioner's timely Application for a Rehearing on April 22, 1977.

The Petitioner presented a timely Motion for Extension of Time within which to file Petition for Writ of Certiorari to the Honorable Justice Lewis F. Powell, who signed an Order on July 13, 1977, extending the time within which to petition for certiorari to and including September 19, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3)(1970).

QUESTIONS PRESENTED

1. Whether the Treaty of Assumption and Bulk Reinsurance denied Empire's policyholders, stockholders and creditors the equal protection of the laws guaranteed by the Fourteenth Amendment by treating differently those policyholders, stockholders and creditors who were similarly situated and by failing to treat those differently situated in a manner consistent with their rights.

2. Whether the trial court's entry of an ex parte decree authorizing the Domiciliary Receiver of Empire to solicit proposals for reinsurance and requiring that a $2,000,000 fund be retained for the payment of creditors and expenses of administration deprived Empire's creditors of their property without due process of law contrary to the Fourteenth Amendment since they were not provided with notice or a hearing at which to question the adequacy of said fund to pay their claims.

3. Whether notice by publication to Empire's policyholders, and creditors of the Receiver's petition for authority to liquidate and reinsure Empire was insufficient under the due process clause of the Fourteenth Amendment and whether the absence of notice to all policyholders, stockholders and creditors of Empire of the proposed adoption of the Agreement to Effectu-

ate the Treaty of Assumption and Bulk Reinsurance and the absence of a hearing thereon deprived Empire's policyholders, stockholders and creditors of their property without due process of law contrary to the Fourteenth Amendment.

4. Whether the Alabama Supreme Court arbitrarily discriminated against the assertion of those federal due process claims relative to a finding of an insurance company's insolvency by holding that such claims despite the trial court's grant of a standing objection to "the introduction of every bit of evidence" and "every ruling" were not preserved for appellate review.

5. Whether the Alabama Insurance Commissioner's devaluation of the trust interest held by Empire by over seventy percent (70%) (from $14,000,000 to $4,250,000) when it had been carried at the $14,000,000 figure for over seven years and had been approved by the insurance commissioner of the State of Alabama and the insurance commissioners of several other states during the course of multiple mergers and acquisitions by Empire deprived Empire's policyholders, stockholders and creditors of their property without due process of law contrary to the Fourteenth Amendment.

6. Whether the retroactive application of the 1972 Alabama Insurance Code, Section 748(2)(b), whereby an insurance company was declared insolvent by virtue of a 1970 Examination Report, deprived its policyholders, stockholders and creditors of their property without due process contrary to the Fourteenth Amendment and impaired their contractual relationships with the company in violation of Article I, Section 10 of the U.S. Constitution.

7. Whether the policyholders, stockholders and creditors of Empire were denied the due process of law guaranteed by the Fourteenth Amendment since the trial judge violated Canons 1, 2 and 3 of the ABA Code of Judicial Conduct.

8. Whether the Alabama Statute requiring that the Alabama Commissioner of Insurance be appointed the receiver of Empire denied Empire's policyholders, stockholders and creditors the due process of law guaranteed by the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I §10 of the United States Constitution:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . .

THE FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

STATUTORY PROVISIONS INVOLVED

Title 28A, Alabama Insurance Code, §748:

Disallowance of assets or credits resulting from "wash" transactions.

* * *

(2) The Commissioner shall disallow as an asset any de-

posit, funds or other assets of the insurer found by him after a hearing thereon:

(a) Not to be in good faith the property of the insurer;

(b) Not freely subject to withdrawal or liquidation by the insurer at any time for the payment or discharge of claims or other obligations arising under its policies, and

(c) To be resulting from arrangements made principally for the purpose of deception as to the insurer's financial condition as at the date of any financial statement of the insurer.

(3) No such disallowance or credits shall be valid unless made by the Commissioner after a hearing of which notice was given the insurer within six (6) months after the date of the financial statement of the insurer as to which such deception is claimed was filed with the Commissioner.

(4) The Commissioner may suspend or revoke the certificate of authority of any insurer which has knowingly been a party to any such deception or attempt thereat. (1971, No. 407, effective January 1, 1972).

Title 28A, Alabama Insurance Code, §237: Life insurance, annuities, and disability insurance; unfair discrimination.

(1) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(2) No person shall make or permit any unfair discrimination between amount of premium, policy fees, or rates

charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever. (1957, p. 866, § 4, appvd. Sept. 18, 1957; 1971, No. 407, effective Jan. 1, 1972.)

STATEMENT OF THE CASE

The parties to the state court proceeding were Shearn Moody, Jr. ("Moody"), the Petitioner herein; Protective Life Insurance Company ("Protective") Intervenor below; and Charles H. Payne, Commissioner of Insurance of the State of Alabama, as Domiciliary Receiver for Empire Life Insurance Company of America ("Empire").[1]

Empire was incorporated under the laws of the state of Alabama in June, 1963. (R. 683). On July 3, 1963, Petitioner Moody assigned to Empire two-fifths (2/5ths) of his one-eighth (1/8th) life estate interest in a trust created by the will of Libbie Shearn Moody (hereinafter "the Libbie Shearn Moody Trust") (R.742). In 1964, a value of $5,813,440 was given to that trust interest by the Department of Insurance for the State of Alabama (R. 753). In 1965, the value of the said interest was increased to $13,528,000 by examiners of Empire for the Insurance Departments of Alabama, Arkansas and Texas (R. 755).

From 1964 to 1968, Empire, with its principal asset being its interest in the Libbie Shearn Moody Trust, acquired by merger or reinsurance the assets and insurance business of the fol-

[1] Intervenors Myers and Sanford appealed the trial court's order of June 14, 1974, attacked by the Petitioner herein, but the Alabama Supreme Court dismissed Myers and Sanford's appeal on September 23, 1975. Accordingly, Myers and Sanford are not parties interested in the present proceeding.

lowing companies for shares of stock of Empire: Consolidated American Life Insurance Co., Chicago, Illinois (1964); Empire Life Insurance Company of America, Little Rock, Arkansas (1965); National Empire Life Insurance Co., Dallas, Texas (1966); Reliance Life Insurance Co., Dallas, Texas (1968); American Trust Life Insurance Co., Wichita Falls, Texas (1968); and Republic Life Insurance Co., Moline, Illinois (1968) (R. 15). All of these mergers and acquisitions were approved by the insurance departments of the aforementioned states, without disapproval of the value of the interest of Empire in the Libbie Shearn Moody Trust (R. 2495).

In 1968, the Texas Insurance Commissioner questioned whether any value could be given Empire's interest in the trust in connection with the American Trust Life Insurance Company acquisition (R. 2501). However, after a public hearing by the Texas Insurance Commissioner, Empire's reinsurance of American Trust Life Insurance Company was approved and Empire was found to be solvent (Moody's Exhibit 8). This finding was predicated upon the aforementioned 1965 valuation of Empire's interest in the Libbie Shearn Moody Trust because Empire would not otherwise have been solvent (R. 703).

During 1969 and 1970, the Insurance Department of Alabama conducted an examination of Empire and in June, 1969, the Honorable Frank Ussery, the then Insurance Superintendent, wrote a memorandum to the then examiner for the Alabama Insurance Department, directing that, among other things, Empire's interest in the Libbie Shearn Moody Trust be valued at $14,213,440, less a reserve of $1,292,130, which was to be decreased annually by $430,710 (Moody Exhibit 96, R. 4146).

In 1971, the Honorable John G. Bookout succeeded Mr. Ussery as Insurance Superintendent for Alabama, before completion of the then pending examination. The then pending examination of Empire was completed in December, 1971 and was made as of December 31, 1970 (R. 4930). In it, Empire's interest in the Libbie Shearn Moody Trust was devalued to only $4,250,000 (R. 5084). That value was based upon the liquidating value ascribed to the interest in an appraisal made in 1968 by the American Appraisal Company (R. 5086).[2]

Following the completion in December, 1971 of the examination of Empire, the then Texas Insurance Commissioner on April 5, 1972, entered an order of supervision with respect to Empire in Texas (R. 168).

A few days later, on April 17, 1972, the then Commissioner of Insurance for the State of Alabama, John G. Bookout, instituted the proceedings below to place Empire in receivership. After a hearing in which it was admitted that the devaluation of the interest of Empire's interest in the Libbie Shearn Moody Trust was the single act which rendered Empire insolvent (R. 206, 217), the trial court, on June 29, 1972, issued a Decree

---

[2]The American Appraisal Company's appraisal actually gave two values; the other being $8,600,000 as the fair value for continued use (R. 629). It expressly provided that "the valuation conclusions are temporal in nature and should be reviewed and adjusted periodically in keeping with changing conditions of economic, management and legal nature" (R. 669). Another valuation of Empire's interest in the Libbie Shearn Moody Trust was made in 1968 by Dr. Richard B. Johnson and he valued the interest at no less than $16,000,000 and at a reasonable current value of $23,000,000 (R. 778). No other evaluation of Empire's interest in the Libbie Shearn Moody Trust was made between 1968 to the date of the last mentioned examination report which adopted as of December 31, 1970 the lowest figure assigned to the interest in American Appraisal Company's "temporal" report of 1968.

enjoining Empire and its agents from conducting any further business in the State of Alabama and appointing the Honorable John G. Bookout as Receiver and directing him to operate Empire to the end of rehabilitating said company (R. 1016-17). Moody contested the appointment, but did not appeal the decision because the trial court reserved jurisdiction and the right to modify the order (R. 1016), making the order interlocutory.

On September 6, 1973, John G. Bookout as Domiciliary Receiver filed a Petition for Instructions Regarding Reinsurance requesting that he be authorized to advertise and extend an invitation for proposals regarding the total reinsurance of all of the business of Empire (R. 1201-1208). On September 12, 1973, the trial court entered an ex parte order directing that proposals for the reinsurance of Empire be filed with the Court, and further indicating that all of the assets of Empire would be available for transfer as reserves with the exception of the sum of $2,000,000, which would be held by the Receiver to pay administrative costs, the prosecution of derivative actions and allowable claims presented by the creditors (R. 1209).

The Receiver received proposals from 3 different companies to reinsure Empire.[3] They were Protective Life Insurance Company, Mutual Savings Life Insurance Company and Bankers Life and Casualty Company. An analysis of the 3 proposals by

[3] A fourth proposal was forwarded to the Alabama and Texas Receivers on or about April 4, 1974 by Harry L. Edwards, President of National Western Life Insurance Company. National Western's plan provided for Empire's assets to be kept separate from its own assets and for a moratorium on cash benefits available under the reinsured policies of 30% whereas Protective's Plan provided for the commingling of assets and an initial moratorium of 35%, which moratorium was subsequently raised to 50% in an amendment entitled "Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance."

Tillinghast & Company, consulting actuaries, is found in Moody's Exhibit 79 (R. 4037). In addition, Moody submitted a proposal of rehabilitation (R. 3983), pursuant to the recommendation for rehabilitation of the Court's special advisor (R. 3830).

Moody then filed a Motion to Intervene and a Complaint in Intervention as a Defendant (R. 1223), which motion was at first denied on October 22, 1973, but later granted on January 8, 1974 (R. 1378-9).

In his Complaint in Intervention, Petitioner Moody specifically attacked the trial court's ex parte decree of September 12, 1973, among others, and asserted that:

> The total absence of notice to defendant [Empire] and its policyholders, creditors and stockholders and the ex parte nature of such orders [Order of September 12, 1973] constitutes a denial of due process guaranteed by the Fourteenth Amendment to the Federal Constitution. [R. 1226-27]

Commissioner Bookout as Receiver for Empire then filed a Petition for Liquidation and Reinsurance of the Business and Assets of Empire (R. 1363), and petitioned the trial court for an Order of Liquidation and for an Order approving the plan of reinsurance presented by Protective Life Insurance Company as amended (R. 1365-6).

After conducting hearings in February and April of 1974 on Moody's Complaint in Intervention and the Domiciliary Receiver's Petition, the trial court on June 14, 1974, entered a decree, making a final adjudication of insolvency and authorizing the Receiver to enter into a Reinsurance Agreement with Protective Life Insurance Company and to liquidate Empire

(R. 6265). Notice to Empire's policyholders and creditors of the 1974 proceedings was effected by publication and not by individual notice. Moody duly perfected an appeal to the Alabama Supreme Court from the June 14, 1974 Decree (R. 6278).

On March 26, 1975, the Domiciliary Receiver filed a Petition for an Order Approving an amendment to the Reinsurance Agreement (called an "Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance") (R. 6708, 6714). The trial court issued an order on the same day directing that all parties be allowed to present written objections to the proposed agreement and directing that copies of the Receiver's Petition be sent to the parties of record (R. 6752). Notice was not directed, however, to Empire's policyholders, creditors and stockholders and no hearing was had. Moody filed written objections to the proposed Agreement to Effectuate on April 7, 1975 (R. 6943) (see Appendix p. A-13), which objections were adopted by Intervenors Meyers and Sanford (R. 6941) (Appendix p. A-11). Moody made the following objections, among others, to the proposed reinsurance agreement:

(1) That the Treaty of Assumption and Bulk Reinsurance between the Receiver and Protective provides for unequal treatment to the policyholders and creditors of Empire and provides for preferential or priority treatment in many respects (Appendix p. A-16, R.6946);

(2) That it is a denial of due process to simply send assumption certificates to policyholders under the Treaty of Assumption and Bulk Reinsurance, by which they are deemed bound unless they file a written objection within sixty (60) days, since they have had no notice of the proceeding concerning the Treaty and no opportunity to object to the terms thereof (Appendix p. A-23, R. 6952);

(3) That approval of the proposed Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance without a hearing thereon would be a complete denial of Intervenor's and other parties' constitutional rights to due process (Appendix p. A-15, R. 6945).

(4) That Empire is solvent and there is no need for reinsurance (Appendix p. A-26, R. 6955).

Without notice to policyholders, creditors and stockholders whose rights were substantially affected by the Agreement to Effectuate, and without conducting a hearing thereon, the trial court summarily rendered a Memorandum Opinion and Decree on April 10, 1975, approving the Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance, (R. 6965). In its Decree, the trial court held that: "The objections filed by Myers and Sanford, which are identical to those which Moody has attempted to file, [are] completely without merit and due to be rejected." Moody duly prosecuted an appeal to the Alabama Supreme Court from the trial court's Decree. (R. 6982).

Petitioner Moody's appeal from the trial court's decrees of June 14, 1974, November 22, 1974, and April 10, 1975, were consolidated in the Alabama Supreme Court and were affirmed by that Court on February 11, 1977.

In the Alabama Supreme Court Moody specifically assigned as error: (1) The unequal treatment accorded to Empire's policyholders, stockholders and creditors under the Treaty of Assumption and Bulk Reinsurance (Issue I); (2) The unequal treatment accorded to Empire's creditors by virtue of the trial court's ex parte order of September 12, 1973, establishing a $2,000,000 fund for the payment of creditors' claims and ex-

penses of administration, which order was entered without notice to Empire's creditors and without a hearing to determine the adequacy of said fund to pay the creditors' claims (Issue I.1) and (3) the trial court's failure to provide all of Empire's stockholders, policyholders and creditors with notice of the proposed Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance and to conduct a hearing thereon, all in violation of the due process clause of the Fourteenth Amendment (Issue VI).

In his Reply Brief filed with the Alabama Supreme Court several months before the cause was argued on its merits Petitioner Moody argued that the trial court's finding of insolvency involved a retroactive application of §748(2)(b) of the Alabama Insurance Code, which retroactive application denied Empire's policyholders, stockholders and creditors the due process of law guaranteed by the Fourteenth Amendment and which impaired the contractual relationship Empire had with its stockholders, policyholders and creditors contrary to Article I, Section 10 of the United States Constitution. Moody also asserted that the devaluation of Empire's trust interest to $4,250,000.00 as of December 31, 1970, after the interest had been carried at a $14,000,000.00 valuation for seven years with the approval of the Alabama Insurance Department, was an arbitrary devaluation which denied Empire's policyholders, stockholders and creditors the due process of law guaranteed by the Fourteenth Amendment.

In affirming the orders of the trial court, the Alabama Supreme Court held that the issue of insolvency was not before it since Moody had failed to appeal the trial court's order of June 29, 1972 (R. 1016), finding Empire to be impaired and insolvent

and appointing John G. Bookout as Receiver of Empire. The Alabama Supreme Court also held that Moody, the founder, Chairman of the Board and principal stockholder of Empire but not a policyholder thereof, had failed to assert his interest as a creditor of Empire in the trial court and apparently held that he lacked standing to attack the trial court's approval of the Treaty of Assumption and Bulk Reinsurance.

The Alabama Supreme Court nonetheless went on to hold that the Treaty of Assumption and Bulk Reinsurance was not discriminatory and that the trial court did not abuse its discretion by ordering Empire's liquidation and reinsurance.

In his timely Application for Rehearing filed with the Alabama Supreme Court, the Petitioner assigned as error its affirmation of the trial court's order authorizing the liquidation and reinsurance of Empire; its approval of the Treaty of Assumption and Bulk Reinsurance; its holding regarding the Petitioner's alleged lack of standing; the Court's arbitrary refusal to review the issue of insolvency; the Court's failure to hold that the trial court's finding of insolvency involved a retroactive application of § 748(2)(b) of the Alabama Insurance Code in violation of the due process clause of the Fourteenth Amendment and Article I Section 10 (contract clause) of the United States Constitution; the Court's failure to hold that the devaluation of Empire's trust interest to $4,250,000 was arbitrary and that the finding of insolvency predicated thereon effected a denial of the due process of law guaranteed by the Fourteenth Amendment, and finally, that the Court erred in failing to hold that the trial court's failure to provide notice and a hearing for all of Empire's policyholders, stockholders

and creditors with regard to the Agreement to Effectuate denied them the due process of law guaranteed by the Fourteenth Amendment.

The Alabama Supreme Court overruled the Petitioner's timely Application for Rehearing on April 22, 1977.

REASONS FOR GRANTING THE WRIT

I.

THE TREATY OF ASSUMPTION AND BULK REINSURANCE DENIED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT BY TREATING DIFFERENTLY THOSE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS WHO WERE SIMILARLY SITUATED AND BY FAILING TO TREAT THOSE DIFFERENTLY SITUATED IN A MANNER CONSISTENT WITH THEIR RIGHTS.

A. THE ALABAMA SUPREME COURT ERRONEOUSLY HELD THAT THE PETITIONER LACKED STANDING TO ATTACK THE TRIAL COURT'S APPROVAL OF THE TREATY OF ASSUMPTION AND BULK REINSURANCE PROPOSED BY PROTECTIVE.

As the largest single stockholder of Empire, and as a creditor of Empire, Petitioner Moody clearly has a substantial interest in attacking the Treaty of Assumption and Bulk Reinsurance proposed by Protective which deprived stockholders of their entire equity without providing them with any benefits in return (R. 2084) and which deprived creditors of their contractual

rights with Empire. The Alabama Supreme Court acknowledged in its opinion that Moody is "Chairman of the Board and the largest single stockholder of Empire," (Appendix p. A-2), and even the Domiciliary Receiver acknowledged that Petitioner Moody "... is recognized as President and Chairman of the Board of Directors . . . and the largest single stockholder of outstanding common capital stock of Empire and that as such, Shearn Moody, Jr. does have an interest in said company over and above the interest possessed by other persons." (R. 1377-78).

As a shareholder, Moody clearly had standing to attack the Treaty since the evidence is uncontroverted that the Reinsurance Agreement deprives Empire's stockholders of their entire equity without providing them with any benefits in return. In response to an inquiry by Judge Barber, Dr. A. C. Olshen, an actuary who studied the bids for reinsurance of Empire, indicated that Protective's proposal did not provide Empire's stockholders with any benefits:

> (The Court): In the construction of the proposal of Protective Life, Doctor, looking forward through the months and years of operation, do you find any possible benefit to the stockholders under the plan set forth?
>
> (The Witness): No, sir, that I can specifically answer in dollars and cents, your Honor. (R. 2804).

The Petitioner's status as a creditor exists by virtue of a $200,000 debenture which he received from Empire. The existence of the debenture was evident in the 1972 hearings before the trial court below in Empire Life Exhibit 1, (R. 768),

the Alabama Insurance Department's Examination Report of Empire as of December 31, 1965, in which the debenture was fully described and discussed. The Petitioner's status as a creditor of Empire was also evident in the proceedings below by virtue of the fact that Empire had executed a guaranty on January 20, 1969, guaranteeing payment to W. L. Moody and Company Bankers (unincorporated), a sole proprietorship owned by Moody, (R. 4960) of all of the indebtedness of Credit Factoring Inc., an Empire subsidiary, which indebtedness at the time was evidenced by a $785,000 note (R. 151-2; 1879-80).

The Alabama Supreme Court asserted in its opinion that Moody had failed to assert his interest as a creditor in the trial court below and by implication suggested that he lacks standing to attack the Reinsurance Agreement. (Appendix p. A-5). In response, Petitioner Moody submits that by adducing the foregoing evidence in the trial court he clearly made manifest his interest as a creditor. The Alabama Supreme Court did not hold that the foregoing evidence lacked any probative value nor did it expressly hold that Moody's admitted status as a shareholder failed to provide him with the requisite standing.

The principle that interested parties have a right to participate in, and to object to, any activities of a receiver in a receivership proceeding has been well established. In conservatorships, the Superintendent of Insurance cannot rehabilitate, reinsure or liquidate an insurance company without the order of the court, and the court is a forum where "interested parties may assert their rights, object to any proposal made by the superintendent and question the reasonableness of the expenses of the administration." *2 Couch on Insurance 2d*, Section 22:18 (1960); *See*

also, Clark on Receiverships 3rd, Section 532(b); *Britton vs. Green* 325 F.2d 377 (10th Cir. 1963). Moody as an interested party whose rights as a stockholder and creditor of Empire are being cut off by the reinsurance agreement with Protective, certainly has the right to complain of its discriminatory impact.

Moody's standing as a stockholder was uncontroverted and his interest in the proceedings as a creditor was evident from the exhibits admitted into evidence. The Alabama Supreme Court therefore erred in holding that the Petitioner lacked standing to attack the trial court's approval of the Treaty of Assumption and Bulk Reinsurance.

As to the Petitioner's attack upon the provisions of the Reinsurance Agreement discriminating between Empire's policyholders and denying them the equal protection of the laws, the Petitioner would point out that notice of the Receiver's petition for authority to liquidate and reinsure Empire was only given to its policyholders by publication and that the policyholders were *not* given notice of the Receiver's petition for authority to execute the Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance. The Petitioner's assertion that the notice by publication of the Receiver's petition to liquidate and reinsure was inadequate and that the absence of notice regarding the approval of the Agreement to Effectuate was a denial of due process is developed more fully *infra*.

Since Empire's policyholders were not provided with a reasonable opportunity to object to Protective's Treaty, the objections of Moody thereto on behalf of the policyholders should have been entertained by the Alabama Supreme Court. "The principle [pertaining to standing] is not disrespected where con-

stitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court." *NAACP v. State of Alabama*, 78 S. Ct. 1163, 1170, 357 U.S. 449, 459 (1958); *Swann v. Adams*, 87 S. Ct. 569, 385 U.S. 440 (1967); *Barrows v. Jackson*, 73 S. Ct. 1031 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 45 S. Ct. 571, 268 U.S. 510 (1925).

B. THE TREATY OF ASSUMPTION AND BULK REINSURANCE AS AMENDED DENIED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS THE EQUAL PROTECTION OF THE LAWS.

In the Petitioner's objections to the proposed Treaty of Assumption and Bulk Reinsurance he expressly asserted:

> . . . [T]hat the Treaty of Assumption and Bulk Reinsurance between the Receiver and Protective . . . provides for unequal treatment to the policyholders and creditors of Empire and provides for preferential or priority treatment in many respects, . . . [A-16]

In insurance company receivership proceedings, it is the general rule that both policyholders and general creditors are entitled to share pro rata in the distribution of the assets of the company. The purpose of the insurance company receivership acts, much like the Bankruptcy Act, is to put all claimants, including both policyholders and general creditors, on an equal footing and to prohibit preferential treatment for any of the parties. See *2 Couch on Insurance 2d*, §22:82, pp. 775-778 (1960). Policyholders are general creditors of an insurance company in receivership, and as such are entitled to share ratably in

the distribution of the assets of the company. *Palmer, ex rel. American Bankers Ins. Co. v. Palmer*, 363 Ill. 499, 2 N.E. 2d 728, 106 A.L.R. 447 (1936). Policyholders are also expressly prohibited from receiving any preferential treatment.

In Alabama, the procedure for the liquidation of insurance companies and the payment of creditors thereunder is governed by the Alabama Insurance Code, Title 28-A, Sections 621-641. This provision is, with some modification, the Uniform Insurers Liquidation Act and became effective in Alabama on January 1, 1972. It is without question that the purpose of the Uniform Insurers Liquidation Act is to achieve equality among claimants. *2 Couch on Insurance 2d*, Section 22:28, p. 702 (1960); *Ace Grain Company v. Rhode Island Insurance Company*, 107 F.Supp. 80 (1952), *aff'd.* 199 F.2d 758 (2d Cir.); 46 A.L.R.2d 1185.

The Alabama rule against preferential treatment was made clear in the case of *Melco Systems v. Receivers of Transamerica Insurance Company*, 105 So.2d 43 (Ala. 1958). In that case a reinsurer had agreed to pay a certain sum for its liability under a reinsurance agreement with an insurance company in receivership. The Supreme Court of Alabama held that the proceeds of the reinsurance agreement constituted general assets to which the plaintiff insured had no priority over other creditors. All creditors had to share equally in the assets of the company and this included policyholders. As that court stated:

> No subsequent act of the liquidating agent in the course of his duties as trustee can give on creditor a preference over others of like class . . . Equality is equity.

Not only is preferential treatment of certain claimants unlawful under Alabama law, but to the extent that one claimant is preferred, others are discriminated against. Such discrimination between policyholders of the same class is unlawful. *ALA.* INS. CODE TITLE 28A §237:

> LIFE INSURANCE, ANNUITIES, AND DISABILITY INSURANCE: UNFAIR DISCRIMINATION. — (1) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (2) No person shall make or permit any unfair discrimination between amount of premium, policy fees, or rates charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatsoever. (1957, p. 866, §4, appvd. Sept. 18, 1957; 1971, No. 407, effective Jan. 1, 1972).

Even the Domiciliary Receiver, John G. Bookout, has acknowledged that such discriminatory treatment is contrary to Alabama law (Moody Exhibit 16, R. 3062-3; R. 3067-69); and, in fact, has admitted that the only acceptable reinsurance agreement is one which affords all policyholders 100% protection (R. 3069).

In a letter dated April 25, 1973, to the Commissioner of Insurance for the State of Texas, Clay Cotten, Commissioner Bookout expressly acknowledged that Empire's policyholders are general creditors and that the transfer of assets to reserve policies pursuant to a reinsurance agreement, in and of itself,

constitutes an unlawful preference over other creditors (R. 3066-67). He further acknowledged that under Alabama law there was no statutory authority authorizing such a preferential transfer over the general creditors of a corporation in receivership: "As stated earlier, under present Alabama law the policyholders are general creditors and I, therefore, cannot transfer assets to reserve policies in preference over other creditors. I am proposing legislation in our current session of the legislature to cure this situation." (R. 3066).

Where this discriminatory treatment is being accomplished by state action and has no rational or reasonable basis, it is in violation of the Equal Protection Clause of the United States Constitution. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 57 S. Ct. 838, 301 U.S. 459 (1937).

The applicable principle regarding the equal protection of the laws guaranteed by the Fourteenth Amendment was set forth by Mr. Justice Reynolds in *Hartford Steam Boiler Inspection & Ins. Co. supra*, in an excerpt cited from *Louisville Gas & Electric Company v. Coleman, Auditor*, 277 U.S. 32, 37, 38, 48 S.Ct. 423, 425, 72 L.Ed. 770 (1928):

> 'It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, [citations omitted], and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. [citations omitted]. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility provided always that the classification must be reasonable, not arbitrary, and must rest upon some ground

> of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' [citations omitted] That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' [citations omitted]. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. [citations omitted].

See also, *Barbier v. Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357 (1885).

The rule against preferential and discriminatory treatment of any claimant, whether a policyholder, creditor, or otherwise, is important in the present case because it is clear from review of the Reinsurance Agreement between Protective and Empire (See Appendix B p.p. A-27-A-95) that the Agreement effects such preferential and discriminatory treatment.

1. *Unfair Discrimination Against Policyholders Rejecting Reinsurance.*

One obvious element of preferential treatment given by the Reinsurance Agreement is to prefer policyholders who accept the Reinsurance Agreement over those who do not. Under Section XIV of the Reinsurance Agreement (Protective Life's Exhibit 6, R. 4852, 4887, Appendix p. A-56), it is provided that all policyholders who do not reject the reinsurance assumption in writing within 60 days after notice are deemed to have accepted the Reinsurance Agreement and all the terms thereof.

They are further deemed to have agreed to have allowed Protective to file claims with the Receiver in the amount of the total moratoriums placed on the policies. Any amount received by Protective from the Receiver pursuant to these claims is, under the Reinsurance Agreement, to be added by Protective to the Empire Fund and this amount will accrue to the benefit of the policyholders whose policies are reinsured. Policyholders who thus consent to the reinsurance have the benefit of the reinsurance and, in addition, have the benefit of a claim against the fund in the hands of the Receiver. On the other hand, policyholders who reject the assumption are left with nothing but a claim against the fund. Policyholders who accept thus have two bites of the apple; policyholders who reject have but one. This is clearly preferential treatment lacking any rational basis in favor of policyholders who accept the Reinsurance Agreement.

Indeed, for policyholders who reject the Reinsurance Agreement, there is no guarantee that they will even have one bite of the apple. In the hearings on the proposal to accept reinsurance and to proceed with liquidation, Mr. John G. Bookout, the Domiciliary Receiver, admitted that when the trial court entered its order of September 12, 1973 (R. 1209), directing that proposals for the reinsurance of Empire be filed with the court and directing that a $2,000,000 fund be set aside for creditors, the court had not yet set a date for the filing of claims by creditors and therefore had no basis for knowing whether the $2,000,000 fund would be sufficient to satisfy creditors' claims (R. 1441). When questioned as to the basis for the selection of the $2,000,000 figure, Mr. Bookout replied:

> I don't really know. Mr. Webb told me that $2,000,000 had been agreed upon, and it was agreeable with me and I said all right, and that is as far as I remember. (R. 1441) (*See also*, R. 1869-70).

Thus the trial court failed to determine whether the $2,000,000 fund left with Empire to pay general creditors, policyholders who do not consent to the reinsurance, and expenses of administration would be sufficient to pay rejecting policyholders and creditors even roughly the same thing that was being given to accepting policyholders, i.e. approximately 65% of what they were entitled to.

2. *Unfair Discrimination Against Creditors Whose Claims Are Not Assumed by Protective.*

Under the Reinsurance Agreement, Protective does not assume all the liabilities of Empire. Liabilities that were not assumed are set forth in Section VI G of the Agreement and include claims of creditors, claims for dividends on certain policies, the obligations of Empire on surplus debentures, liability for certain commissions, unpaid premium taxes, and any deficiency obligation respecting mortgages (R. 4863). (Appendix p. A-36). But there has been no computation of the amounts of liabilities not assumed and therefore, the trial court had no way of knowing that the creditors whose debts were not assumed will receive more or less than those whose debts were assumed.

For example, Section VI G, paragraph 8, indicates that the non-assumed debts include any deficiency with respect to mortgaged real estate. (Appendix p. A-37). The annual statement of Empire for the year ending December 31, 1973 (R. 5308) reflects that Empire had mortgage loans on its home office

building in Dallas and other properties. But there was no determination made as to whether there might be any deficiency and if so, the amount. Presumably if any such deficiency does exist, it would consume a large portion of the $2,000,000 reserve fund. Further, under Section VI G, paragraph 3, the obligation of Empire to W. L. Moody and Company under a guaranty agreement for about $700,000, as reflected in the 1973 annual statement, is also a non-assumed debt which will consume a significant portion of the reserve fund. The foregoing highlights not only the blatent inadequacy of the $2,000,000 reserve fund to satisfy the claims of Empire's creditors, but it also underscores the unfair discrimination being accorded to creditors of Empire whose debts are arbitrarily not assumed by Protective.

3. *Discrimination Regarding Pending Claims.*

Under Section VI G of the Agreement, Protective assumes only the liabilities of Empire that have been accepted by Empire or which are pending as of the effective date of the Agreement. Protective does not assume claims that Empire has previously rejected, whether or not such claims are pending in court. This is clearly unlawful discriminatory treatment lacking any rational basis with respect to valid claims which have been rejected by Empire and preferential treatment with respect to the others.

4. *Unfair Discrimination Against Empire's Agents.*

Further, the Agreement provides in Section VI that Protective assumes certain liabilities as of the "effective date" of the Agreement. But with respect to commissions due to Empire's agents, Protective agrees to assume liability for the payment of these commissions for premiums collected before June 29,

1972, and none thereafter. Certainly this provision unlawfully discriminates against Empire's agents as creditors and prefers other creditors and certain agents' claims without any rational basis therefor.

5. *Unfair Discrimination in the Application of Different Moratorium Amounts to Different Policyholders.*

Concerning preferential treatment of certain policyholders, the Reinsurance Agreement gives certain policyholders more than others, and gives certain policyholders less. For example, the Reinsurance Agreement, Section VIII, provides that the moratorium is 35% of the withdrawable funds of certain specified policies; 35% of the total value of certain separate accounts of other policies; and 35% of the net reserves of certain policies (R. 4875). (Appendix p. A-46). This obviously results in different treatment for different classes of policyholders for which no rational basis has been advanced.

According to the report of George V. Stennis & Associates, consulting actuaries, the value of Empire's business in force was approximately $6,000,000 (Moody's Exhibit 8, R. 3842). Mr. Bookout stated in April, 1973 in effect, that there should be no moratorium and that "any reinsurance agreement that would not offer 100% protection to the policyholders would seem out of the question" (R. 3069). Mr. Thomas K. Pennington, Vice-President and actuary for Protective, admitted on January 18, 1973 that Empire's deficiency in assets was likely to be only 20-30% (R. 4490).

According to the projections of Mr. Pennington, the business of Empire would be sufficient to eliminate the moratorium in a ten-year period, if not sooner (R. 4507, 6919). He also indicated that the Empire business should produce a profit of between $750,000 to $800,000 annually (R. 4507). Under the Reinsurance Agreement all of the profit will inure to the benefit of Protective after the moratorium is ended (Protective's Exhibit 6). Under the Reinsurance Agreement, Protective pays absolutely nothing for that annual profit or for Empire's business (an annual premium income of over $3,000,000 and assets of approximately $29,000,000) (Protective's Exhibit 22, R. 5308). Even a 20% moratorium would not give any consideration for the value of the Empire business. Moreover, there should be no moratorium if the value of Empire's interest in the Libbie Shearn Moody Trust was in fact at least $5,000,000 more than the $4,250,000 value given it in the 1973 statement. According to the valuation made by Dr. Trosper, Professor of Insurance at Indiana University, that interest has a value of not less than approximately $14,000,000 (R. 6381).

If, in fact, Empire's interest in the Libbie Shearn Moody Trust was of the value assigned to it by Dr. Trosper, or by Dr. Johnson or by the State Insurance Departments of Alabama, Arkansas and Texas in their 1968 examination, then no insurance agreement whatsover was required and the policyholders, creditors and stockholders of Empire have been wrongfully deprived of their rights by the Reinsurance Agreement with Protective.

6. *Unfair Discrimination Against Policyholders Who Elect Reduced Paid-up or Extended Term Insurance.*

The Reinsurance Agreement approved by the Trial Court further discriminates against policyholders who place their policies on reduced paid-up or extended term insurance. In

Section VIII B1(d) of the Reinsurance Agreement (R. 4872) (Appendix p. A-44) it is provided that if a policy is placed on reduced paid-up or extended term insurance, the amount of such insurance is reduced by 1/2 of the then-existing moratorium. The same section further provides that the moratorium continues against the paid-up insurance and is to be deducted from its cash surrender value. Accordingly, these policyholders are charged twice, once with 1/2 of the moratorium and next with 100% of the moratorium. To the extent that these policyholders are discriminated against, all other policyholders are preferred, and both this discrimination and this preferential treatment are unlawful and lack any rational basis.

7. *Unfair Discrimination in the Form of Preferential Treatment for Consenting Policyholders.*

Under the First Amendment to this Reinsurance Agreement, Paragraph 4 (R. 4904) (Appendix p. A-70) it is provided that the Receiver shall assign to Protective death proceeds from insurance policies on the life of Moody in the amount of $4,350,000, subject to increase or decrease of that amount to match the admitted asset value of Protective's interest in the Libbie Shearn Moody Trust. (The $4,350,000 figure exceeds by $100,000 the initial admitted asset value and the Agreement contains no justification whatsoever for the increase.) The Receiver is to pay all premiums on the life insurance on Moody's life and Protective is to reimburse the Receiver annually for its pro rata part. However, if Protective, upon non-payment by the Receiver pays the premiums, Protective receives all of the policy benefits, or $12,000,000. Accordingly, Protective may receive all of the insurance proceeds on Moody's life, or some portion

thereof in excess of $4,350,000. Mr. Herbert Crook, the Texas Ancillary Receiver for Empire, testified that the "so-called windfall" would be retained in the receivership for the benefit of consenting policyholders; and then the creditors and stockholders (R. 2258, 2261). However, the Reinsurance Agreement contains no provision for the return of such windfall by Protective to the Receiver. Such proceeds could be sufficient to entirely eliminate the moratorium, in which event Protective, not the creditors and stockholders, will retain the excess under the terms of the Reinsurance Agreement (R. 4906). Upon the elimination of the moratorium from that "windfall" or from ordinary operations (which Mr. Thomas K. Pennington, Vice President and actuary of Protective, projected would occur in ten years (R. 4507, 6919)), the consenting policyholders whose policies are reinsured will thereafter receive 100% of their claims, but the non-consenting policyholders and all other creditors have only a claim for their pro rata part of the two million dollar fund, or so much of it as is left after paying expenses of administration.

8. *Unfair Discrimination Regarding the Payment of Dividends.*

With respect to the payments of dividends on Empire policies, the Reinsurance Agreement approved by the trial court unlawfully prefers certain policyholders in several ways. The Reinsurance Agreement provides in Section XII A 1 and 2 (R. 4884) (Appendix p. A-53), that dividends on policies assumed by Protective shall thereafter be declared only at the sole discretion of Protective, except in the case of Presidents Special Investors Plan (PSIP) policies issued by Empire Life Insurance Company of America, Little Rock, Arkansas, and assumed by

Empire. In addition, most of the policies issued by Empire or reinsured by it were "participating" policies, i.e., the company paid dividends upon the policies to the policyholders. In the case of the American Trust policies, the dividend obligation was a contractual one under a reinsurance agreement between American Trust and Empire (R. 140; 2496-97). In other words, the amount of the dividend was not left to the discretion of the board of directors of the company, but had to be in a certain specified amount. However, in Section XII A of the Reinsurance Agreement (R. 4883) (Appendix P. A-52-A-53), the dividend obligation of Empire to American Trust was not assumed. This means that the contractual obligations to policyholders are treated differently as to the American Trust policies, than with respect to all other policies issued or assumed by Empire. Again no rational basis is given for such treatment.

9. *Discrimination as to Amounts Left on Deposit.*

Policyholders with matured endowments or coupons left on deposit with Empire prior to the effective date of the Reinsurance Agreement are charged the full amount of the moratorium as to these amounts, but those whose endowments mature after the effective date, or whose coupons are left on deposit after the effective date are not so charged (R. 4872) (Appendix P. A-44). This obviously prefers certain policyholders over others without any rational basis whatsoever.

10. *Discrimination as to Policy Loan Applications.*

Although the moratorium is stated to become effective as of the effective date of the Reinsurance Agreement and chargeable against withdrawable funds, including the policy loans, it is stated in Section VIII A-1, that in determining moratorium

amounts, policy loan requests after June 29, 1972 shall be disregarded (R. 4869) (Appendix P. A-42). This prefers policyholders who made their loan requests prior to that date and discriminates against those who requested loans after that date, again without any justification.

11. *The Tontine Aspect of the Reinsurance Agreement Unlawfully Discriminates Between Policyholders.*

Tontine Insurance derives its name from its Italian inventor Tonti. The original concept was that premiums were invested for a number of persons and income was divided among all, but shares of members who died did not go to the insured's legal representatives but to the interest of the last surviving members until the last survivor took the whole income and principal. *1 Couch on Insurance 2d* §1:102 pp. 98-99 (1960).

In the present case Doctor Olshen, the Domiciliary Receiver's expert witness, testified that one of the beneficial elements of the Reinsurance Agreement was that the agreement had a tontine effect. (R. 2785-6). The tontine aspect works in the following manner: The moratorium at the beginning is set at 35%. However, according to Protective's own projections, the income to be produced by the business taken over by Protective is projected to be sufficient to reduce the moratorium every year until the tenth year, or sooner, so that there will be no moratorium on the policies. The result of this reduction in the moratorium is that if a man cashes in his policy in the first year, he gets a 35% moratorium placed on withdrawable funds and gets only 65% of cash surrender value. If a man cashes in his policy in the second year, the policyholder gets less of a moratorium applied and accordingly gets more than the man who cashes in

the first year and so on for ensuing years. The tontine aspect was put in to create an incentive for people to continue to pay premiums on their policies. (R. 2785). However, in practice, the tontine aspect penalizes those policyholders who wish to cash in their policies in early years, and discriminates among policyholders who either cash in or lapse over the period of time that the moratorium is being reduced. Petitioner submits that this tontine aspect is contrary to Alabama law and denies Empire's policyholders the equal protection of the laws guaranteed by the Fourteenth Amendment.

Indeed, Alabama Insurance Department Regulation #15 (August 1, 1957) provides in relevant part as follows:

SUBJECT: TONTINE OR SEMI-TONTINE POLICIES PROHIBITED

> Life Insurance Companies now issuing in the State of Alabama any policy generally known as tontine or semi-tontine, or containing tontine or semi-tontine features, or any policy described below, or any similar policy, are hereby ordered to cease and desist therefrom.
>
> * * *

The Alabama Insurance Code also contains the following provision. Title 28A Section 237 of that Code provides as follows:

> LIFE INSURANCE, ANNUITIES, AND DISABILITY INSURANCE: UNFAIR DISCRIMINATION.—(1) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

> (2) No person shall make or permit any unfair discrimination between amount of premium, policy fees, or rates charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever. (1957, p. 866, §4, appvd. Sept. 18, 1957; 1971, No. 407, effective Jan. 1, 1972).

The above provision prohibits discrimination in the payment of policy benefits. However, the tontine aspect of the Reinsurance Agreement approved by the Alabama Supreme Court does just this. Though policyholders are entirely of the same class and may have the same expectation of life, under the Reinsurance Agreement, policyholders who decide to cash in their policies or who lapse in the early years are penalized and much less than policyholders who do not. Petitioner submits that this aspect of the Reinsurance Agreement is unfair discrimination, prohibited both by Alabama law and the equal protection clause of the Fourteenth Amendment. *Order of Railway Conductors of America v. Quigley*, 131 Tex. 4, 111 S.W. 2d 698 (1938); *See Also, State Life Insurance Co. v. Strong*, 127 Mich. 346, 86 N.W. 825 (1901); *Robinson v. Wolfe*, 27 Ind. App. 683, 62 N.E. 74 (1901); *Equitable Life Assur. Society v. Commonwealth*, 113 Ky. 126, 67 S.W. 388 (1902).

From these examples, one thing is certain: Unlawful preferential treatment in the Reinsurance Agreement abounds. Accordingly, the trial court and the Alabama Supreme Court should not have approved the Reinsurance Agreement and their approval of the same denied the Petitioner and Empire's policyholders, stockholders and creditors the equal protection of the laws guaranteed by the Fourteenth Amendment.

II.

THE TRIAL COURT'S ENTRY OF AN EX PARTE DECREE AUTHORIZING THE DOMICILIARY RECEIVER OF EMPIRE TO SOLICIT PROPOSALS FOR REINSURANCE AND REQUIRING THAT A $2,000,000 FUND BE RETAINED FOR THE PAYMENT OF CREDITORS AND EXPENSES OF ADMINISTRATION DEPRIVED EMPIRE'S CREDITORS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT SINCE THEY WERE NOT PROVIDED WITH NOTICE OR A HEARING AT WHICH TO QUESTION THE ADEQUACY OF SAID FUND TO PAY THEIR CLAIMS.

In his Complaint in Intervention, Petitioner Moody specifically attacked the trial court's Order of September 12, 1973, among others, on the grounds that the trial court's failure to provide Empire's policyholders, stockholders and creditors with notice of its intent to enter an order authorizing the Receiver to solicit proposals for the reinsurance of Empire, which proposals were to provide for a two-million dollar fund to pay Empire's creditors and the expenses of administration, denied them the due process of law guaranteed by the Fourteenth Amendment:

> The total absence of notice to defendant [Empire] and its policyholders, creditors and stockholders and the ex parte nature of such orders [Order of September 12, 1973] constitutes a denial of due process guaranteed by the Fourteenth Amendment to the Federal Constitution [R. 1226-27].

The Alabama Supreme Court's assertion that "the evidence is uncontroverted that it [the $2,000,000 fund] is sufficient for

the equitable payment of such claims," [A-9] is contrary to the record. Indeed, as indicated *supra*, when questioned as to the basis for the selection of the $2,000,000 figure, Mr. Bookout replied:

> I don't really know. Mr. Webb told me that $2,000,000 had been agreed upon, and it was agreeable with me and I said all right, and that is as far as I remember. (R. 1441) (*See also*, R. 1869-70).

The trial court's failure to provide the Petitioner as well as Empire's other creditors with a hearing as to the adequacy of the $2,000,000 fund to pay their claims prior to the issuance of the September 12, 1973 Order effected a deprivation of their property without the due process of law guaranteed by the Fourteenth Amendment.

III.

NOTICE BY PUBLICATION TO EMPIRE'S POLICYHOLDERS AND CREDITORS OF THE RECEIVER'S PETITION FOR AUTHORITY TO LIQUIDATE AND REINSURE EMPIRE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE ABSENCE OF NOTICE TO ALL POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF EMPIRE OF THE PROPOSED ADOPTION OF THE AGREEMENT TO EFFECTUATE TREATY OF ASSUMPTION AND BULK REINSURANCE AND THE ABSENCE OF A HEARING THEREON DEPRIVED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

The only notice provided to Empire's policyholders and creditors regarding the Receiver's petition for authority to liquidate and reinsure Empire was had by publication. After the Receiver secured permission to reinsure Empire and sought authority to execute an Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance proposed by Protective, Moody filed objections to the Agreement to Effectuate Protective's Treaty and asserted that it is a denial of due process to simply send assumption certificates to policyholders under the Treaty of Assumption and Bulk Reinsurance, by which they are deemed bound unless they file a written objection within 60 days, since they have had no notice of the proceeding concerning the treaty and no opportunity to object to the terms thereof (R.5952) (Appendix P.A-23). Moody also asserted that approval of the proposed Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance without a hearing thereon would be a complete denial of the intervenor's and other parties' constitutional rights to due process (R.6945) (Appendix P.A-15).

The trial court, however, without conducting a hearing on the Receiver's Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance and without providing notice to all of Empire's policyholders, stockholders and creditors, summarily approved and granted the Receiver the authority to execute the Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance. The trial court specifically held that Moody's objections ". . . [are] completely without merit and due to be rejected." (R.6967).

All the Reinsurance Agreement provides is that policyholders, after the reinsurance agreement has been approved and implemented, are notified that they can accept the agreement or elect

to be a general creditor in a fund that is likely to be quite insufficient to give them what they previously bargained for. In either case, they will be forced to take less than their contractual rights under their policies. The Agreement to Effectuate implemented the Reinsurance Agreement without prior notice or an opportunity for hearing for these policyholders.

It is a general rule in receiverships that no action may be taken against any party in interest unless that party is given notice and an opportunity for a hearing on the matter. *2 Couch on Insurance 2d* Section 22:52 (1960). When faced with the interpretation of regulatory schemes governing liquidation and reinsurance, the courts have indicated that due process requires that the judiciary should attempt to afford the affected parties the fullest opportunity for a hearing consistent with the protection of the public interest. *Stewart v. Citizens Casualty Company of New York*, 23 N.Y. 2d 407, 244 N.E. 2d 690, 692 (1968); *Britton v. Green*, 325 F. 2d 377 (10th Cir. 1963) *Morris v. Investment Life Insurance Company of America*, 204 N.E. 2d 550, 1 Ohio App. 2d 330 (1960); *Lucas v. Manufacturing Lumbermen's Underwriters*, 349 Mo. 835, 163 S.W. 2d 750 (1942).

Under the Alabama Insurance Code, the only provisions for action to be taken without notice is for the issuance of an injunction restraining the insurer or others from wasting or disposing of the company's property pending further order of the court. Alabama Insurance Code Title 28A, Section (1). Under subsection 2 of this provision, the Court may enter such other injunctions or orders as it may be necessary to prevent interference with the proceeding, the obtaining of preferences, etc. But, nothing is said about other orders being entered without notice or an

opportunity for a hearing. Thus, notice should be given for actions under these provisions.

Notice is further required to be given to all "claimants" Alabama Insurance Code Title 28A Sections 636-638. In this case notice of the Receiver's Petition for Authority to Liquidate and Reinsure Empire was given to Empire's policyholders and creditors by publication and notice of the Receiver's Petition for Authority to Execute the Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance was given to the parties of record, but that notice excluded notice to all policyholders, creditors and stockholders of Empire. Although there is no express statutory provision one way or the other concerning notice to the policyholders, creditors and stockholders before implementing a proposal for reinsurance and liquidation, the Petitioner submits that adequate notice and an opportunity for hearing was required by the U. S. Constitution.

This Court in a series of cases has made clear that the state cannot participate in the interference with or taking of individual property interests without prior notice and an opportunity for hearing. *Goss v. Lopes*, 95 S. Ct. 729, 419 U.S. 565 (1975); *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507 (1971); *Board of Regents v. Roth*, 92 S. Ct. 2701, 408 U.S. 564 (1972); *Fuentes v. Shevin*, 92 S. Ct. 1983, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 89 S. Ct. 1820, 395 U.S. 337 (1969); *Boddie v. Connecticut*, 91 S. Ct. 780, 401 U.S. 371 (1971).

In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950), this Court indicated that the "words of the Due Process Clause . . . at a minimum . . . require that deprivation of life, liberty or property by adjudication be preceded by

notice and opportunity for hearing appropriate to the nature of the case." *Id* at 313, 70 S. Ct. at 657. "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Orlean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783 (1914). A right "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." *Mullane*, *supra*, 339 U.S. at 314, 70 S. Ct. at 657.

As to the propriety and constitutional validity of notice by publication, this Court indicated in *Mullane* that: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections [citations omitted]. The notice must be of such nature as reasonable to convey the required information [citation omitted] and it must afford a reasonable time for those interested to make their appearance." *Mullane* at 314. As to the efficacy of notice by publication, this Court noted that: "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, . . ." *Mullane* at 315. Accordingly, Mr. Justice Jackson held that: "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Mullane* at 318. It is clear in the present proceeding that notice by publication alone to Empire's policyholders and creditors regarding the Receiver's petition to liquidate and reinsure Empire failed to satisfy the due process clause of the Fourteenth Amendment since the addresses of Empire's policyholders and creditors were available

and notice by publication was not the most effective and reasonable means of notifying them of the Receiver's petition.

In *Fuentes v. Shevin*, this Honorable Court held that a state replevin statute which allowed a Plaintiff to recover property from a Defendant summarily without notice to the Defendant and an opportunity for a hearing violated the due process clause of the Fourteenth Amendment. Similarly, in *Goldberg v. Kelly*, 387 U.S. 254, 90 S. Ct. 1011 (1970), this Court held that a state was without power to deprive a family on welfare of their vested expectancy in welfare checks without giving the recipients prior notice and an opportunity for hearing prior to the cut-off.

The present case is no different from these previous U.S. Supreme Court cases. Policyholders and creditors in this case were not given individual notice with regard to the Receiver's petition to liquidate and reinsure Empire nor were they given any notice or an opportunity for a hearing on the proposed Agreement to Effectuate. Certainly, policyholders would have objections to the proposal since by virtue of the Agreement to Effectuate the moratorium amount, that is, the reduction in the cash benefits available under Empire's policies, originally set at 35 percent is increased to 50 percent.

Further, notice to policyholders and stockholders who were parties of record was not notice to all stockholders and policyholders of Empire. The "class representation" doctrine enunciated and applied by the court in *Larson v. Pacific Mutual Life Insurance Company*, 373 Ill. 614, 27 N.E. 2d 458 (1948) is totally inapplicable here. In the present action the trial court's order allowing the intervention of certain policyholders and stockholders of Empire, specifically decreed that such parties

were being allowed to intervene individually and not as representatives of the class of Empire policyholders and stockholders (R. 1604-05). Therefore, notice to the policyholders and stockholders who were individually before the court was not notice to all the Empire's stockholders and policyholders.

After the Agreement to Effectuate was approved, both policyholders who accepted reinsurance and policyholders who rejected it lost the contractual rights that they had under policies with Empire. A 50 percent moratorium was placed in affect for accepting policyholders and a greater loss is likely for rejecting policyholders. This deprivation of property rights, which is being done by state mandate, is certainly no less than the deprivation of property rights in *Fuentes*, and is a much greater deprivation of property rights than the deprivation of the expectancy of welfare checks which was involved in *Goldberg*. Clearly, the due process clause of the Fourteenth Amendment required individual notice to all of Empire's policyholders and creditors regarding the Receiver's petition to liquidate and reinsure Empire and notice to all of Empire's policyholders, stockholders and creditors as well as an opportunity for a hearing prior to the approval of the Agreement to Effectuate.

IV.

THE ALABAMA SUPREME COURT ARBITRARILY DISCRIMINATED AGAINST THE ASSERTION OF THOSE FEDERAL DUE PROCESS CLAIMS RELATIVE TO THE FINDING OF EMPIRE'S INSOLVENCY BY HOLDING THAT SUCH CLAIMS DESPITE THE TRIAL COURT'S GRANT OF A STANDING OBJECTION TO "THE INTRODUCTION OF EVERY BIT OF EVIDENCE" AND "EVERY RULING" WERE NOT PRESERVED FOR APPELLATE REVIEW.

The Alabama Supreme Court refused to review the issue of Empire's insolvency since it was of the opinion that Moody's failure to appeal the trial court's decree of June 29, 1972, finding Empire to be impaired and insolvent and appointing John G. Bookout as Receiver for Empire, barred review of the issue in connection with the orders on appeal before it, to-wit: the trial court's decree of June 14, 1974, authorizing the Receiver to proceed with the liquidation and reinsurance of Empire, and the trial court's decree of April 10, 1975, authorizing the Receiver to execute the Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance (Appendix p. A-7).

It is clear, however, from an examination of the Domiciliary Receiver's petition for authority to liquidate and reinsure Empire filed in 1974 and from the trial court's decree of June 14, 1974 granting the same, that the issue of insolvency remained the central issue throughout the receivership proceedings. In the Domiciliary Receiver's petition, paragraph ten thereof reads as follows:

> 10. Your Receiver, as Commissioner of Insurance of the State of Alabama, has caused an extensive investigation of the facts regarding the said company, its impairment, insolvency, and standing, and finds that the company is impaired and insolvent. Your Receiver finds that further efforts to rehabilitate the insurer, Empire Life Insurance Company of America, would be useless.

During the hearing conducted in connection with the Receiver's petition for authority to liquidate and reinsure Empire, counsel for Intervenor Protective, admitted at the hearing that Empire's insolvency was one of the two issues to be determined by the Court:

> If I might just merely say, so far as the burden is concerned, we have had to prove two things. One, further efforts in the judgment of the Commissioner to rehibilitate this Company would be useless. That was proved about the first half hour, and number two, that the company was insolvent. Well, that was proved in the first hour of this case. [R.2998]

It is also significant to note that the trial court granted Petitioner Moody a standing objection to every bit of evidence admitted during the 1974 proceeding (R.1687):

> Let me make this statement, Gentlemen. I have already stated that consideration of this matter will be under equity rules. That is the way I will consider it. It will save a great deal of time and effort if you will understand that I give you a standing objection to the introduction of every bit of evidence into every question that is asked. You can have a standing objection to every ruling that I make as we move through this Hearing. I ask your cooperation to that end. . . .

When the trial court ultimately entered its decree of June 14, 1974, granting the Receiver the authority to proceed with the liquidation and reinsurance of Empire, the Court found and concluded that at the time: "Empire is, and at all times since the filing of this delinquency proceeding has been, both impaired and insolvent. At the time of the hearing, Empire was impaired in excess of $10,000,000 and insolvent in excess of $6,000,000." The trial court in 1974 necessarily had to find that Empire was either impaired or insolvent before it could issue its order of liquidation.[4]

---

[4] It would also appear that the trial court had no choice but to find that Empire was insolvent since it was preempted from making its own determination of Empire's financial status by Sections 745 through 753 of the Alabama Insurance Code which vest in the Commissioner of Insurance discretion as to the valuation of admitted assets.

When the Receiver filed his petition for authority to enter into an Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance, Petitioner Moody filed objections to the proposed reinsurance agreement and in that pleading specifically asserted that Empire was solvent and did not need to be reinsured. (R.6955), (Appendix p. A-26).

The Alabama Supreme Court in its opinion held that the objections by Moody in the foregoing pleading to the discriminatory aspects of the reinsurance agreement were properly raised and preserved for appellate review since: "... the trial court, trying the case under equity rules, expressly gave the parties a standing objection to 'every bit of evidence' and 'to every ruling.' In this posture we consider that the objection was timely made." (Appendix p. A-4).

Yet the Alabama Supreme Court arbitrarily chose to find that Moody had not preserved for appellate review the issue of insolvency which was raised by him in the very same pleading in which he raised objections to the reinsurance agreement, and which issue was raised by both the Receiver and Intervenor Protective during the 1974 hearing on the Receiver's petition for authority to liquidate and reinsure Empire. Indeed, the trial court expressly found that Empire was insolvent in its decree of June 14, 1974 authorizing the Receiver to proceed with the liquidation and reinsurance of Empire.

From the foregoing it is clear that the Alabama Supreme Court's arbitrary refusal to review the issue of insolvency properly raised and preserved by Moody below denied him the opportunity to present the federal constitutional claims pertaining thereto. It is also clear as a matter of law that the Alabama

Supreme Court's arbitrary refusal to review the issue of insolvency does not constitute an adequate and independent state ground barring this Court from reviewing the constitutional issues pertaining thereto; to-wit: the denial of due process caused by the Alabama Insurance Commissioner's arbitrary devaluation of Empire's trust interest, and the denial of due process and violation of Article I Section 10 of the Constitution caused by the retroactive application of the Alabama Insurance Code in connection with the trial court's finding of insolvency. *NAACP v. Alabama Ex Rel Patterson*, 357 U.S. 449 (1958); *Rogers v. Alabama*, 192 U.S. 226 (1904); *NAACP v. Alabama Ex Rel Flowers*, 377 U.S. 288, 294-302 (1964); *Barr v. City of Columbia*, 378 U.S. 146, 149-50 (1964); *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965); *Camp v. Arkansas*, 404 U.S. 69 (1971); *Sullivan v. Little Huntingpark, Inc.*, 396 U.S. 229 (1969).

V.

THE ALABAMA INSURANCE COMMISSIONER'S DEVALUATION OF THE TRUST INTEREST HELD BY EMPIRE LIFE INSURANCE COMPANY OF AMERICA BY OVER 70 PERCENT (FROM $14,000,000 to $4,250,000) WHEN IT HAD BEEN CARRIED AT THE $14,000,000 FIGURE FOR OVER SEVEN YEARS AND HAD BEEN APPROVED BY THE ALABAMA INSURANCE COMMISSIONER AND THE INSURANCE COMMISSIONERS OF SEVERAL OTHER STATES DURING THE COURSE OF MULTIPLE MERGERS AND ACQUISITIONS BY EMPIRE DEPRIVED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF

THEIR PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

VI.

THE RETROACTIVE APPLICATION OF THE 1972 ALABAMA INSURANCE CODE, SECTION 748(2)(b), WHEREBY EMPIRE WAS DECLARED INSOLVENT BY VIRTUE OF A 1970 EXAMINATION REPORT, DEPRIVED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF THEIR PROPERTY WITHOUT DUE PROCESS CONTRARY TO THE FOURTEENTH AMENDMENT AND IMPAIRED THEIR CONTRACTUAL RELATIONSHIPS WITH EMPIRE IN VIOLATION OF ARTICLE I, SECTION 10 OF THE U.S. CONSTITUTION.

Shortly after Petitioner Moody assigned to Empire two-fifths (2/5's) of his one-eighth (1/8) life estate interest in the Libbie Shearn Moody trust, a value of $5,813,440.00 was given to that trust interest by the Department of Insurance for the State of Alabama (R. 750). In 1965 the value of the said interest was increased to $13,528,000 by examiners of Empire for the Insurance Departments of the states of Alabama, Arkansas and Texas (R. 755).

From 1964 to 1968, Empire, with its principal asset being its interest in the Libbie Shearn Moody Trust, acquired by merger or reinsurance the assets and insurance business of the following companies for shares of stock of Empire: Consolidated American Life Insurance Co., Chicago, Illinois (1964); Empire Life Insurance Company of America, Little Rock, Arkansas (1965); National Empire Life Insurance Company,

Dallas, Texas (1966); Reliance Life Insurance Company, Dallas, Texas (1968); American Trust Life Insurance Company, Wichita Falls, Texas (1968); and Republic Life Insurance Company, Moline, Illinois (1968) (R. 15). All of these mergers and acquisitions were approved by the Insurance Departments of the aforementioned states without disapproval of the value of the interest of Empire in the Libbie Shearn Moody Trust (A. 2495). In 1968 the Texas Insurance Commissioner questioned whether any value could be given Empire's interest in the trust in connection with the American Trust Life Insurance Company acquisition (R. 2501). However, after a public hearing by the Texas Insurance Commissioner, Empire's reinsurance of American Trust Life Insurance Company was approved and Empire was found to be solvent (Moody's Exhibit A). This finding was predicated upon the aforementioned 1965 valuation of Empire's interest in the Libbie Shearn Moody Trust because Empire would not otherwise have been solvent (R. 703).

During 1969 and 1970, the Insurance Department of Alabama conducted an examination of Empire and in June, 1969, the Honorable Frank Ussery, the then Alabama Insurance Superintendent, wrote a memorandum to the then-examiner for the Alabama Insurance Department directing that, among other things, Empire's interest in the Libbie Shearn Moody Trust be valued at $14,213,440, less a reserve of $1,292,130, which value was to be decreased annually by $430,710 (Moody's Exhibit 96, R. 4146).

In 1971, the Honorable John G. Bookout succeeded Mr. Ussery as Insurance Superintendent for Alabama, before completion of the then-pending examination. The then-pending

examination of Empire was completed in December, 1971 and was made as of December 31, 1970 (R. 4930). Catastrophically, Empire's interest in the Libbie Shearn Moody Trust was devalued to $4,250,000! (R. 5084).

The $4,250,000 valuation was apparently based upon the liquidation value contained in an appraisal of the trust interest made in 1968 by the American Appraisal Company (R. 5086). Another evaluation of Empire's interest in the Libbie Shearn Moody Trust was made in 1968 by Dr. Richard B. Johnson and he valued the interest at no less than $16,000,000 and at a reasonable current value of $23,000,000 (R. 778). No other evaluation of Empire's interest in the Libbie Searn Moody Trust was made between 1968 and the date of the last mentioned examination report, December 31, 1971, which adopted as of December 31, 1970, the lowest figure assigned to the interest in the American Appraisal Company's "temporal" report of 1968.

Following the completion in December, 1971, of the examination of Empire, the then-Insurance Commissioner of the State of Texas on April 5, 1972 entered an order of supervision with respect to Empire in Texas (R. 168). A few days later, on April 17, 1972, John G. Bookout instituted an action to place Empire in receivership in the State of Alabama.

At the hearing on the Commissioner's Bill of Complaint, counsel hired by Petitioner Moody, Mr. Sams, inquired as to whether Empire would have been impaired or insolvent if the value assigned to the life estate interest in the Libbie Shearn Moody Trust were carried at the valuation ascribed to it in the 1965 examination report. Commissioner Bookout replied "There would be no insolvency. I believe there would be an impairment." (R. 206). In response to subsequent examination by Mr. Sams, Commissioner Bookout admitted that if the trust interest were carried at a figure of approximately $13,000,000 then Empire would not be insolvent:

> Q. [Sams] And simple mathematics would indicate to us, then, that if it were carried at $13,000,000 that asset, it would not be insolvent, is that not mathematically correct?
>
> A. [Bookout] I believe you are right. (R. 217).

During the 1972 hearing, Mr. Simpson (an attorney for the receiver) questioned Mr. Johnson (an expert for Moody) about whether the Libbie Shearn Moody Trust satisfied §748 (2)(a) [sic] of the Alabama Insurance Code:

> Q. [Simpson] Section 748 and §2(a) [sic] [Alabama Insurance Code, effective January 1, 1972] states: "the Commissioner" of insurance, of course, we are talking about, "should disallow as an asset, any deposit, funds or other asset of the insurer found by him after a hearing thereon not freely subject to withdrawal or liquidation by the insurer at a time for the payment of [sic] discharge of claims or other obligations arising under its policy." Would you consider this asset one to be freely subject to withdrawal or liquidation at any time?
>
> A. [Johnson] Not independent of its association with a body of life insurance, but I assume that in any liquidation procedure one would seek an insurer, another insurer to take over the insurance and the assets along with it. In that situation, I believe an evaluation, but perhaps not $13,000,000, and maybe it is 10, but some higher evaluation than the American appraisal valuation would be appropriate. (R. 377-78).

On June 29, 1972, the trial court issued an order finding Empire insolvent and appointing Bookout as Receiver. Moody

contested the appointment, but he did not appeal the decision because the trial court reserved jurisdiction and the right to modify the order.

The Alabama Insurance Department in the Examination Report completed in the latter part of December, 1971, and which was deemed to have been made as of December 30, 1970, placed a value on the trust interest of $4,250,000 at the direction of Commissioner Bookout, being the liquidation value suggested in the American Appraisal Company's appraisal. The Petitioner submits that the Alabama Insurance Commissioner's devaluation of the trust interest from the $14,000,000 figure to the $4,250,000 liquidating value, after the trust interest had been carried at the $14,000,000 figure for over seven years with the approval of the Alabama Insurance Department was blatantly arbitrary and wholly unreasonable. The rapid devaluation has had a devastating impact upon the property rights of Empire's policyholders, stockholders and creditors and the trial court's finding of insolvency premised thereon clearly denied Empire's policyholders, stockholders and creditors the due process of law guaranteed by the Fourteenth Amendment. *Caroline W. Dobbins v. City of Los Angeles*, 25 S.Ct. 18, 195 U.S. 233 (1904). As Mr. Justice Day asserted in *Caroline W. Dobbins, supra*: ". . . . the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment." 25 S. Ct. at 21. The arbitrariness of Commissioner Bookout's devaluation of the trust interest is underscored by his radical departure from the conduct of his predecessors in office and especially by his radical departure from the program of gradual devaluation of the Trust

interest at the rate of $430,710.00 per year proposed by his predecessor in office, Mr. Frank Ussery.

The Petitioner further submits that the selection of the $4,250,000 liquidation value in the examination report made in 1971 was predicated upon section 748(2)(b) of the Alabama Insurance Code which became effective January 1, 1972. That section provides in relevant part:

> The Commissioner shall disallow as an asset any deposit, funds or other assets of the insurer found by him after a hearing thereon . . . (b) Not freely subject to withdrawal or liquidation by the insurer at any time for the payment or discharge of claims or other obligations arising under its policies, . . .

Section 748 became effective after the American Appraisal Company's appraisal and after the Alabama Insurance Department's 1970 Examination Report made in December 1971, which Examination Report is the basis of the original assertion of insolvency. Yet, during both the 1972, as well as the 1974, hearings, the attorneys for the Commissioner argued that Section 748(2)(b) of the Alabama Insurance Code justified the action of the Alabama Commissioner of Insurance in 1971 in devaluing the trust interest to the $4,250,000 liquidation value set forth in the American Appraisal Company's appraisal. During the 1974 proceedings the attorney for Intervenor Protective advised the Court that the relevant law concerning the valuation of unusual assets (i.e., the trust) was "Section 748(2)(b) of Title 28(A) of the Alabama code." (R. 2609).

Since the examination report made in December of 1971 valued Empire's interest in the trust as of December 31, 1970

and since the aforementioned section of the Alabama Insurance Code became effective on January 1, 1972, the Commissioner was in effect in 1971 applying the 1972 statute retroactively to the prejudice of Empire's policyholders, stockholders and creditors. Accordingly, the trial court's finding that Empire was insolvent on the basis of the Commissioner's devaluation of the trust interest gave retroactive effect to Section 748(2)(b) of the Alabama Insurance Code and denied Empire's policyholders, stockholders and creditors the due process of law guaranteed by the Fourteenth Amendment.

Despite the broad range of discretion which is afforded to the states in exercising their police power, the exercise of that discretion in giving retroactive effect to certain legislative enactments has a limit which must be maintained if constitutional safeguards are not to be overthrown. *Hartford Steam Boiler Inspection and Sign Insurance Company vs. Harrison*, 301 U.S. 459 (1937); *Pennsylvania Coal Company vs. Mahon*, 435 Ct. 158, 260 U.S. 393 (1922). The most fundamental reason why retroactive legislation is deemed to be suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960) .

In the present action Empire's trust interest had been valued at the $14,000,000 figure between 1965 and 1972 and had been approved by the insurance commissioners of the various states with which Empire had come into contact by virtue of its multiple mergers and acquisitions. To allow the Alabama Insurance

Commissioner to devalue a reserve asset to a liquidating value arbitrarily determined by him, a devaluation of approximately $10,000,000 in a 1970 examination report, on the basis of a 1972 statutory enactment, is clearly a retroactive application of said statute which is blatantly unreasonable and which has had a devastating financial impact upon Empire's policyholders, stockholders and creditors. Where the retroactive application of a statute defeats the reasonable expectations of the parties affected thereby, then their rights to due process of law have been denied and their contractual relationships have been impaired. *Forbes Pioneer Boatline vs. Board of Commissioners*, 258 U.S. 338 (1922).

The retroactive application of Section 748(2)(b) has meant instant insolvency for Empire and has necessarily impaired the contractual rights of every policyholder, shareholder, and creditor of Empire and has deprived every shareholder of his investment in the company. To allow the application of the statute to have such retroactive effect violates Article I Section 10 of the U. S. Constitution which provides that: "no State shall pass . . . any Law . . . impairing the obligation of contracts." *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 55 S. Ct. 555 (1935); *Pennsylvania Coal Co. v. Mahon, supra.*

VII.

THE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF EMPIRE WERE DENIED THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT SINCE THE TRIAL JUDGE VIOLATED CANONS 1, 2 AND 3 OF THE ABA CODE OF JUDICIAL CONDUCT.

Canon 1 entitled: *A Judge Should Uphold the Integrity and Independence of the Judiciary*, provides as follows:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 entitled: *A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities*, provides as follows:

> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 3, Section A, subparagraph (4) provides as follows:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties

> of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

The commentary to the foregoing Section indicates that:

> The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.
>
> An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief *amicus curiae*.

The evidence adduced in the trial court below raises serious questions as to the impartiality and fairness of the receivership proceeding involving Empire since it is clear that the trial court held repeated ex parte communications regarding the solvency of Empire with a Mr. Paul Carr who was not a party to the proceeding.

The comments of the trial court, the Honorable William C. Barber, regarding his friend and advisor Paul Carr were as follows:

> Since the institution of this matter in this Court, I believe that *I am quite sure that I am the one that suggested that Mr. Carr might be a good (R2049) consultant* and one who I would listen to and whose statements I would have the utmost confidence in. *I made that suggestion to Mr. Bookout.* I think I did.
>
> At any rate, it wasn't long after that until Mr. Bookout did employ Mr. Carr and when he did I was glad and *Mr. Carr frequently has had me call him* [Book-

out] *and had me ask him questions that were in my mind relative to the matters that are before this Court today*. I make no apology for it. I'm glad of it. He has been helpful to me. I haven't always agreed with him, when there have been areas of disagreement those areas have been discussed and I have made a decision. [Emphasis added]

* * *

If there is anything improper about that why then a proper higher tribunal will have to say so, but that is the way I operate in this court, and I want everybody to know it, and I want everybody to know about my relationship with Mr. Paul Carr. He is one of my very dear friends and that is the way I look at it right now, and I don't have very many. (R.2051).

The foregoing statements by the Honorable Judge Barber clearly show that Judge Barber was using his position and influence as a Judge in order to have the parties to the litigation hire his friend Paul Carr as a consultant. The foregoing clearly shows that the trial court was having ex parte communications with the Plaintiff-Receiver in this case which communications are clearly in violation of Canons 1, 2 and 3 of the Judicial Code and consequently denied the parties to the proceeding the due process of law guaranteed by the Fourteenth Amendment.

The testimony of Paul Carr corroborates the existence of the ex parte communications. The following testimony of Mr. Carr documents that the Alabama Insurance Commissioner and other authorities of the State of Alabama, acting under color of state law, were shopping for a court in which to institute receivership proceedings against Empire prior to June of 1972.

The following excerpts are from the deposition of Paul Carr conducted on March 8, 1974, by Mr. Thomas Beech, counsel for

the Petitioner, and which deposition was admitted into evidence during the 1974 receivership proceedings pertaining to the Receiver's Petition for authority to liquiate and reinsure Empire:

Q. [Beech]
A. [Carr]
Q. Well, let's start this way, What position have you had with the Empire Life receivership? [R 5554].
A. I have been a consultant to the Receiver and the Court.
Q. When did you first begin this role?
A. January of 1972.
Q. I'm sorry, the date bothered me. Are you sure the date is January, 1972?
A. When I was first called in on the Empire Life situation, yes.
Q. Do you know the date the receivership in Alabama was invoked?
A. June 29, 1972, Yes.
Q. So you were called in before the receivership business?
A. Before the receivership was effective, yes.
Q. All right. And who called you in in January, 1972?
A. The Commissioner of Insurance, Mr. John Bookout.
Q. Is he the first one that contacted you about Empire Life's problem or did Judge Barber contact you first?
A. I'm not positive as to the order of which it was, but its entirely possible that the Judge called me first. It was done quite close together and I don't know which, you know, which was the first.
Q. Well, will you relate the first conversation with the Judge when he called you about Empire Life?

A. He was saying that he had been notified [R. 5555] that the Insurance Department was considering placing a complaint against Empire Life Insurance Company in his Court for receivership, involuntary receivership hearing, and that he wanted to know that — if I would be available to assist him in the event it came into his Court and was so ordered.

Q. Can you give us the approximate date of this conversation, early January or late January, 1972?

A. Well, this — well, to be factual I think I said January of 1972. I believe it would be right before Christmas in 1971.

Q. December of '71?

A. Yes.

Q. Well, did you have one or more conversations with Judge Barber before you had your first conversation with Mr. Bookout about the Empire Life receivership?

A. My best recollection would be, would be just one.

Q. All right, Did Judge Barber instruct you to call Mr. Bookout and get in touch with him?

A. Yes.

Q. And did you do so?

A. Yes.

Q. How long after Judge Barber's phone call?

A. Very shortly thereafter. I would say, you know, a couple of days.

Q. All right. Will you relate your phone [R. 5556] conversation with Mr. Bookout about Empire Life?

A. That the — I had — was calling him as a result of my conversation with Judge Barber and at that time we set up an appointment to get together to discuss the matter which — and then I came to Montgomery sometime in January.

Q. First part of January or the last part of January?

A. I would say more like the middle of January.

Q. All right. And who did you meet with in Montgomery?

A. In Montgomery, there was Mr. Bookout and an attorney by the name of Robert Alton.

Q. All right. Well, how long did your conversation or conference last with Mr. Bookout and Mr. Alton?

A. I'm going from memory. It's — I would estimate about an hour and a half to two hours.

Q. Where did the meeting take place?

A. In Mr. Bookout's office.

Q. What was discussed at that meeting, Mr. Carr?

A. What services I could perform and *my fees therefor in the event Empire Life was placed in a receivership.* [Emphasis Added]

Q. All right. What services were you to perform at that conference; did you agree on the services that you would perform? (R 5557)

A. That I would perform as an insurance consultant what matters they would like to have from the administrative viewpoint.

Q. Now, what does that mean, administrative viewpoint?

A. From operations, you know of the company.

Q. Financial advisor?

A. Financial primarily, yes sir.

Q. Did they tell you at that time what the financial impairment of Empire Life was?

A. They gave me some figure, yes.

Q. Well, what was the figure; do you recall?

A. I'm going from memory. Something like a deficit of — figure in excess of eleven million dollars, which included the capital structure as a liability.

Q. All right. Well, at that time in that conference with Mr. Bookout and Mr. Alton did either one of them refer to Shearn Moody, Jr. by name?

A. Yes. To the effect that they had asked if I knew him and I said I never met him. They asked if I had ever had any contact with Empire Life, you know, and I said negative (R. 5558).

Q. All right. How many meetings did you have with Mr. Alton and/or Mr. Bookout between this meeting in January, middle of January, 1972, until the receivership was imposed in June of 1972 in Judge Barber's courtroom?

A. I would say it was several meetings. It might have been as many as a half dozen, certainly; maybe up to more than that.

Q. In person?

A. In person and by the telephone. (R. 5560).

While serving as a special advisor to the Alabama State Court Judge, Paul Carr with the judge's encouragement and approval entered into consulting fee arrangements with parties to the litigation before the court. Paul Carr submitted, during a deposition, a memo he wrote himself which is self-explanatory: "MEMO FOR FILE-February 9, 1973

On even date, Ry Baily came by and discussed Protective's interest in acquiring or reinsuring Empire Life. Briefly their plan is to be couched along the lines — I raised the following questions:

1. Had they thought about the disposition, and how to handle any "windfall" gain from:

   A. Death of Shearn Moody

   B. Recovery from derivative action [R. 3894]. We discussed generally the fact that Protective Life was most definitely interested in making a deal on Empire and Bailey insisted they were going to make what they would consider a most attractive offer.

Bailey asked me as to my position in the matter. I told him. He replied that he understood that I was to instruct and advise the Court on the plans submitted. He said this was not what he had in mind. He was inquiring speculatively as to what function or category I would or could fill after the hearing in April, in the event their plan was accepted by the court.

I replied that Paul Carr and Associates was a consulting firm and, as such, were always available and definitely interested in discussing retainer relationships with honorable clients. In this position we should be most happy to discuss with them performing services for Protective Life in the event they were the successful bidder [R. 3805-06]."

The foregoing testimony indicates that John G. Bookout was shopping for a receivership court in January of 1972, three months before he filed his complaint (April 17, 1972). The testimony also raises questions as to the ability of the trial court to have been impartial and fair with regard to the Empire Receivership proceeding[5]. Such ex parte communications on the part of the trial court raises serious questions as to whether the stockholders, policyholders and creditors of Empire received the due process of law guaranteed by the Fourteenth Amendment.

VIII.

THE ALABAMA STATUTE REQUIRING THAT THE ALABAMA COMMISSIONER OF INSURANCE BE AP-

[5] "The opportunity to be heard has been required to be adequate, fair, full, or reasonable. *The hearing or defense must be before a competent as well as before a just, equitable* and *fair* and *impartial* court or *tribunal, full and complete,* or on *the merits* and before trial and judgment or decree. Such hearing has been required to be *fair, fair and impartial, full and fair.*" 16A C.J.S. *Constitutional Law* §569(4) (1956).

POINTED THE RECEIVER OF EMPIRE DENIED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT.

In the Alabama Receivership court the insurance commissioner was by state law the court-appointed receiver of the receivership court. Alabama Insurance Code Section 634 provides as follows:

> (1) Whenever under this chapter a receiver is to be appointed in delinquency proceedings for a domestic or alien insurer, the court shall appoint the commissioner as such receiver. The court shall order the commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

The Alabama Receivership Court was by state law powerless to fire its receiver and its receiver by law was its state's ultimate regulatory authority concerning life insurance companies. As a result of these statutory provisions the policyholders, stockholders and creditors of Empire were denied due process of law. The Receivership Court was powerless to do anything other than to rubber stamp whatever the Insurance Commissioner Receiver wanted done with respect to the life insurance company.

The Petitioner expended thousands of dollars in legal costs and legal proceedings where his constitutional right to due process had been violated. The special interest law in Alabama required the Insurance Commissioner Plaintiff who decided to place Empire in receivership to become the receiver of the receivership court in question. It is difficult to perceive how an insurance commissioner who decides to place a company in

receivership can then be expected as receiver to make a good faith effort to rehabilitate the very company which he had decided to place into receivership initially. Such a statutory scheme clearly denied the stockholders, policyholders, and creditors of Empire a fair and impartial hearing before the Receivership Court and accordingly denied them the due process of law guaranteed by the Fourteenth Amendment.

CONCLUSION

For the reasons stated, Petitioner prays that his Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama be granted.

Respectfully submitted,

FRANK G. NEWMAN
NEWMAN, SHOOK & NEWMAN
Professional Corporation
4330 Republic National Bank Tower
Dallas, Texas 75201
(214) 747-9091

MARTIN PAUL SOLOMON
286 Fifth Avenue
New York, New York 10001
ATTORNEYS FOR PETITIONER,
SHEARN MOODY, JR.

PROOF OF SERVICE

Proof of service of three copies of Petitioner's Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the petitions were filed.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-428

SHEARN MOODY, JR.,

Petitioner,

VS.

STATE OF ALABAMA, EX. REL CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE CO., OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

INDEX

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1976-77

Shearn Moody, Jr.

S. C. 931:1268:1270 v.

State of Alabama,
ex rel. Charles H. Payne,
Commissioner of Insurance and Receiver of
Empire Life Insurance Co. of America
Appeal from Jefferson Circuit Court

BEATTY, JUSTICE

This is an appeal from an adjudication of insolvency, an order of liquidation and approval of a reinsurance agreement as ordered by the Circuit Court of Jefferson County. We affirm.

The material facts of this case are reported in *Moody v. State ex rel. Payne, Commissioner,* ..... Ala. ....., 329 So.2d 73 (1976), thus only a brief factual review is necessary here.

On April 13, 1972 the Commissioner of Insurance of the State of Alabama instituted a receivership proceeding in the Circuit Court of Jefferson County against Empire Life Insurance Company, an Alabama corporation. The trial court placed Empire in receivership on June 29, 1972, appointed the Commissioner as receiver, and on September 12, 1973 entered an order authorizing him to solicit offers from other insurance companies for the reinsurance of Empire. Later, in January, 1974 the receiver petitioned the Court for an order of liquidation of Empire and for approval of a reinsurance agreement presented by Protective Life Insurance Company, which later

intervened. Shearn Moody, chairman of the board and the largest single stockholder of Empire, intervened. After a hearing on the receiver's petition, the relief requested was granted on June 14, 1974.

On October 15, 1974, Moody filed a motion, later amended, under Rule 60(b), ARCP, to introduce new evidence establishing the solvency of Empire as of the date of the liquidation decree. This motion was overruled on November 22, 1974. Subsequently, the receiver petitioned for approval of an amendment to the reinsurance agreement. This petition was granted over Moody's objections, and on April 10, 1975, the trial court by decree authorized the receiver to execute the amendment.

Essentially, Moody raises three issues: (1) that the trial court erred in denying Moody's 60(b) motion; (2) that policyholders of Empire were discriminated against as a result of the trial judge's reinsurance order; and (3) that the trial court abused its discretion in ordering liquidation and reinsurance. We shall take up the issues presented *seriatim*.

Moody contends that the trial court erred in denying his Rule 60(b) motion for relief from the decree of June 14, 1974. Evidence he obtained from a post-judgment appraisal of one of Empire's assets, an interest in the Libbie Shearn Moody Trust, establishing an asset value of approximately $14,000,000 instead of the $4,250,000 value given it by the Commissioner, he asserts, justified a new hearing. The appraisal referred to in his motion was made by Mr. Harold Crandall, who had testified as an expert witness for Moody at the April, 1974 hearing. Although the Crandall appraisal was referred to in the motion as Exhibit B, it was neither attached to the motion nor submitted to the Court. Indeed, on November 15, 1974 when Moody's attorneys argued the motion, they submitted a different appraisal, one made by Dr. Joseph Trosper. Trosper's appraisal expressly recited that its author had not been contacted by Moody until October 18, 1974, three days after Moody's Rule 60(b) motion was filed. Moody did not explain why this appraisal could not have been either the subject of his motion or procured prior to the April hearing.

Rule 60(b)(2), ARCP, authorizes relief from a final judgment for:

> . . .*newly discovered* evidence which by due diligence *could not have been discovered* in time to move for a new trial. . . . *(emphasis supplied.)*

Was appellant's evidence "new" or "newly discovered?" There can be no Rule 60(b)(2) relief for evidence which has come into existence after the trial is over simply because such a procedure would allow all trials perpetual life. "Newly discovered evidence" means evidence in existence at the time of trial of which the movant was unaware. *Prostrollo* v. *Univ. of S. Dak.*, 63 F.R.D. 9 (D.C.S.D. 1974). And for a litigant to obtain a new trial on the ground of newly discovered evidence, it must appear that his reasonable diligence before trial would not have revealed this evidence which he failed to discover. *Plisco v. Union Ry Co.*, 379 F.2d 15, 16 (CCA 2nd 1967). Hence, the trial court did not abuse its discretion in denying Moody's motion since this evidence was not even created until after October 18, 1974, over four months after the decree ordering liquidation and approving the reinsurance treaty. Any

attempt by Moody to explain away his unawareness would have been inapt in those circumstances.

Appellee contends that Moody's assertion of discrimination against the policyholders fails because Moody did not raise this issue properly in the trial court, that is, that discrimination was raised for the first time in Moody's objections to the trial court's decree authorizing execution of the agreement to effectuate the reinsurance treaty, issued on April 10, 1975, almost a year after the trial court had approved the reinsurance agreement. This position overlooks the fact that the trial court, trying the case under equity rules, expressly gave the parties a standing objection to "every bit of evidence" and "to every ruling." In this posture we consider that the objection was timely made. Next, the appellee maintains that the trial court was not required to allow the objection of discrimination because Moody himself was found by the trial court to be in open contempt for violating the injunction referred to in ..... Ala. ....., 329 So.2d 73, 10 ABR 543, 546-554 (1976). While it may be true as a general proposition that "[a] party in contempt is not entitled to insist upon a hearing or trial of the case out of which the contempt arose until he first purges himself of the contempt," *Wilkinson* v. *McCall*, 247 Ala. 225, 23 So.2d 577 (1945), nevertheless for due process reasons "[t]he power to deny a hearing to a person in contempt does not include the power to refuse to such person in contempt the right to defend in the main case on the merits." *McCollum* v. *Birmingham Post Co.*, 259 Ala. 88, 65 So.2d 689 (1953). By objecting to discrimination against policyholders, Moody appears to have been doing just that, defending such

interest as he claims in the main case on the merits of the reinsurance agreement.

Appellee's assert further that Moody has no standing to complain of the trial court's approval of the reinsurance agreement. On the other hand, Moody contends that his position as the largest single stockholder of Empire, and as a creditor of Empire, gave him the standing to challenge the agreement which, he contends, "deprives stockholders of their entire equity without providing them with any benefits in return . . . and which deprives creditors of their contractual rights with Empire."

Of course Moody must have some direct interest in the wrongs he alleges, otherwise he has no standing to complain. *Cf. Peterson* v. *Hamilton*, 286 Ala. 49, 237 So.2d 100 (1970); *U.S.* v. *936.71 Acres of Land*, 418 F.2d 551 (CCA 5th 1969). The record does not reveal that prior to this appeal Moody has ever claimed to be a policyholder of Empire. His claim to be a creditor is based upon a debenture bond which, he asserts, he received from Empire and which is alluded to as part of an exhibit introduced at the 1972 hearing, and a guaranty of an indebtedness of Credit Factoring, Inc. made by Empire to W. L. Moody and Company, Bankers, of which Moody contends he is sole owner. But Moody never did plead his interest as a creditor prior to the April, 1974 hearing when liquidation of Empire was ordered and approval of the reinsurance agreement was granted by the trial court, and it is now too late to bring to the trial court's attention any such claimed interest. Had he properly asserted this standing, nevertheless the reinsurance agreement does not appear discriminatory. The policyholders, some forty thousand in number, result in part from acquisitions and mergers

of many insurance companies with Empire, and they represent many different insurance plans. The reinsurance plan contains provisions which accommodate the various policy distinctions. To be sure, all of the policies are not alike, and the law does not require that they be treated alike. Different classifications based upon substantial differences are not unlawful discrimination. *State* v. *Pure Oil Co.*, 256 Ala. 534, 55 So.2d 843 (1951); *Carpenter* v. *Pac. Mut. Life Ins. Co.*, 10 Cal.2d 307, 74 P.2d 761 (1937); affirmed *Neblett* v. *Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182 (1938).

Approximately one-half of the Empire policyholders reside in Texas, and most of Empire's physical assets are located in that state. From an order issued by the 53rd Judicial District Court of Texas ordering the Texas ancillary receiver to cooperate in the execution of the reinsurance agreement, Moody appealed to the Court of Civil Appeals of Texas, claiming unlawful discrimination among Empire's policyholders and creditors. Citing the voluminous testimony relating to the fairness of the agreement and the special provisions formulated to produce equitable benefits for each group, that court found no discrimination. We agree. Indeed, it is difficult to imagine any other course, since the policyholders before and after the agreement, had only the right to file a claim against the receiver of the insolvent company for the amount of the cash value of the policies. *Carpenter* v. *Pac. Mut. Life Ins. Co.*, supra. See also *Fletcher* v. *Tuscaloosa Fed. Sav. & Loan*, 294 Ala. 173, 314 So.2d 51 (1975).

The record in this case reveals that Empire Life Insurance Company of America was in precarious financial condition some

three years before it was placed in receivership. A panel composed of the insurance commissioners of five states attempted to effect rehabilitation without receivership, and although some improvement resulted, an examination conducted by the insurance departments of Texas, Alabama and South Dakota found Empire insolvent in excess of six million dollars and impaired in excess of ten million dollars. It was then that formal receivership proceedings were commenced and the then commissioner of insurance of Alabama was appointed receiver. Because of the six million dollar insolvency, the trial court restricted payments of cash values of policies to fifty percent when voluntarily withdrawn prior to death. Moody did not contest the finding of insolvency and made no appeal from the trial court's ruling of June 29, 1972. Apparently Moody accepted the insolvency finding because when the receiver obtained approval from the lower court to solicit reinsurance proposals, Moody was one of those who submitted plans for the rehabilitation of the company. Moreover, Moody made no issue of Empire's insolvency during the lengthy hearing in April, 1974 when the issue of rehabilitation or reinsurance was aired. Accordingly, Moody's attempts to raise that issue on this appeal must also fail. *Dennis* v. *Hines*, 262 Ala. 541, 80 So.2d 616 (1955).

The record reveals more than ample evidence upon which the trial court could have determined that further efforts at rehabilitation would be useless, and that reinsurance was necessary to prevent loss of all policyholder benefits to them. The Protective Life Insurance Company was one of those tendering a reinsurance agreement, and there is evidence in the record of a comparative analysis establishing it as the better of those proposed.

S. C. 931:1268:1270

Protective's plan guaranteed payment of all death benefits, as well as all other maturity benefits, on all Empire policies. It also provided for full payment of all cash benefits accruing after September 15, 1972. This would guarantee to all policyholders who continued to pay premiums their full policy benefits which would be attributable to their current premiums, *i.e.*, cash surrender value, loan value, etc. It provided for a limitation on those cash benefits which policyholders could exercise voluntarily, simply because Empire's assets were worth much less than the reserve liabilities which Protective would assume. The effect of the "moratorium," thirty-five percent, later increased by the trial court to fifty percent because of the expense of defending Moody's numerous lawsuits, would be to reduce the reserves Protective would have to establish. However, Protective agreed to a ten-year limit upon the moratorium, thus providing full policy benefits at the end of ten years to policyholders accepting the plan. In executing its plan, Protective agreed to place with the receiver an amount of assets equal to the reserve liability of every policy of those policyholders rejecting the plan, less the moratorium amount. Because such a payment by Protective represented the value of the agreement to accepting policyholders as well, both classes of policyholders, those accepting and those rejecting, were treated equally. Protective further agreed to make an annual calculation of the ratio of Empire's assets to its reserve liabilities and to reduce the amount of the moratorium as that ratio improves. Also, Protective agreed to receive no profit until this moratorium is eliminated and all policyholders' benefits are restored to accepting policyholders. Any profits were to be added to Empire's assets.

Non-policyholder creditors whose claims were not assumed by Protective were provided for by having the receiver retain from the assets of Empire a two million dollar fund for the payment of their claims. This fund was specified in the advertisements for reinsurance bids, and the evidence is uncontroverted that it is sufficient for the equitable payment of such claims.

Under the facts of this case we cannot state that the trial court abused its discretion by ordering liquidation and reinsurance. The commissioner of insurance has followed the applicable statutory procedures of Title 28A, *Alabama Code*, relative to these delinquency proceedings, and the evidence adduced sufficiently established insolvency in the first instance, the necessity for liquidation, and a fair and equitable reinsurance plan thereafter. The findings and conclusions of the trial court are due to be affirmed. *Stephens* v. *Stephens*, 280 Ala. 312, 193 So.2d 755 (1966); *First Nat. Bank of Birmingham* v. *Brown*, 287 Ala. 240, 251, So.2d 204 (1971).

AFFIRMED.

Torbert,[1] C. J., Maddox, Faulkner and Shores, JJ., concur.

[1]Chief Justice Torbert was not a member of the Court at the time this case was orally argued. However, he has carefully listened to the tape recordings of oral argument and studied the briefs. Code of Alabama, Tit. 13, § 7; *Alonzo v. State ex rel. Booth*, 283 Ala. 607, 219 So.2d 858.

APRIL 22, 1977

THE SUPREME COURT OF ALABAMA

JUDICIAL DEPARTMENT

SC 931
SC 1268
SC 1270

SHEARN MOODY, JR.

VS.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE COMPANY OF AMERICA

JEFFERSON CIRCUIT COURT
NO. 171-687

ORDER

IT IS ORDERED that the applications for rehearing filed in these causes on February 25, 1977, be, and the same are hereby, overruled.

[6941] **OBJECTIONS AND COMMENTS OF G. L. MYERS AND W. B. SANFORD RELATING TO PROPOSED AGREEMENT**

Comes now G. L. Myers and W. B. Sanford, claimants, in this proceeding, and pursuant to the Order of this Honorable Court dated March 26, 1975, makes the following objections and comments concerning the Petition of Receiver for Order Approving Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance, which Petition was filed on March 26, 1975, and hereby states as follows:

I.

Claimants Myers and Sanford reaffirm the objections and comments of Shearn Moody, Jr. relating to the proposed agreement, a copy of which objections is attached hereto and incorporated by reference herein.

WHEREFORE, G. L. Myers and W. B. Sanford respectively requests leave to file additional objections and comments at a later date and they respectfully pray that the aforementioned Petition of the Receiver be denied.

Respectfully submitted,
WILLIAM H. MILLS

William H. Mills
1033 Frank Nelson Building
Birmingham, Alabama 35203

Attorney for Claimants

[6942] **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Objections and Comments have been served upon the Honorable James W. Webb, Attorney of Record for the Receiver by mailing a copy of the same to him in the United States mail, properly addressed and with sufficient postage prepaid.

This the 5th day of April, 1975.

WILLIAM H. MILLS
Of Counsel for Claimants

[6943] **OBJECTIONS AND COMMENTS OF SHEARN MOODY, JR. RELATING TO PROPOSED AGREEMENT**

Comes now Shearn Moody, Jr., an Intervenor in this proceeding, and pursuant to the Order of this Honorable Court dated March 26, 1975, makes the following objections and comments concerning the Petition of Receiver for Order Approving Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance, which Petition was filed on March 26, 1975, and hereby states as follows:

1.

By letter dated February 28, 1975, Protective Life Insurance Company notified the Honorable Charles H. Payne, Receiver for Empire Life Insurance Company of America, that unless all of the conditions specified in 1, 2 and 3 on page 2 thereof were met within the time limit specified therein, then the Treaty of Assumption and Bulk Reinsurance between the Receiver of Empire Life Insurance Company of America (hereafter called "Empire") and Protective Life Insurance Company (hereafter called "Protective") was terminated effective March 1, 1975. A copy of that letter is annexed hereto and made a part hereof.

Shearn Moody, Jr. (hereafter called "Moody") is informed and believes that none of the conditions have been met and, [6944] therefore, the Treaty of Assumption and Bulk Reinsurance has been terminated. Shearn Moody, Jr. alleges upon information and belief that although the said Receiver did not transfer any assets of Empire to Protective, as referred to in 1 on Page 2 of the said letter dated February 28, 1975, that someone other than the said Receiver sent a telegram to Curtis

E. Brown of the Republic National Bank of Dallas authorizing and directing transfer of securities owned by Empire to Mr. William Phillippi, as agent for Protective, and that said Bank made such transfer without authorization by the said Receiver and that he has not confirmed or ratified the said telegram.

Moody is further informed and believes that neither this Honorable Court nor the Honorable Herman Jones have approved a Fifth Amendment to the said Treaty of Assumption and Bulk Reinsurance.

2.

Since the Treaty of Assumption and Bulk Reinsurance has been terminated by Protective by the aformentioned letter dated February 28, 1975, there is no agreement to effectuate and the Petition of the Receiver for an Order Approving "Agreement to Effectuate" such Treaty should be denied.

3.

The Proposed "Agreement to Effectuate" the Treaty not only is an attempt to effectuate an agreement which has already been terminated by Protective, but it also is an attempt to substantially modify the terms and conditions of the prior Treaty without a hearing thereon and without any justification therefor.

Thomas K. Pennington, Vice President and Actuary for Protective, testified before the Honorable Herman Jones at the hearing conducted by him upon the Motion of the Ancillary Receiver for approval of the Treaty of Assumption and Bulk Reinsurance. Such hearing was conducted commencing February 10, 1975. At that time, Mr. Pennington testified that he knew [6945] of no material adverse change in the financial condition

of Empire which would necessitate any increase in the moratorium and that the moratorium would not be increased by more than 3% on account of the Old National policies. At the time of such hearing, Protective was fully aware of and had previously considered the question of its lack of insurable interest upon Moody's life. It was also fully aware of Cause No. 112034 in the 122 District Court of Galveston County, Texas and of the telegram of January 14, 1975, from Scott E. Manley to Gene D. Wyatt, President of Moody National Bank, as Trustee for the Libbie Shearn Moody Trust. The proposal under the proposed agreement attached to the said Petition of the Receiver to increase the moratorium on Empire policies to 50% of the withdrawable funds is thus totally unwarranted and contrary to the position of Protective through the sworn testimony of its said Vice President and Actuary. Moreover, approval of such proposed agreement without a hearing thereon would be a complete denial of Intervenor's and other parties' constitutional rights to due process.

4.

The State of Alabama has adopted, with some modifications, the Uniform Insurers Liquidation Act, effective January 1, 1972. Title 28 (A) Alabama Insurance Code, Sections 621-641. It is without question that the purpose of the Uniform Insurers Liquidation Act is to achieve equality among claimants. Couch on Insurance, §22:82, P. 777; *Ace Grain Company v. Rhode Island Insurance Company*, 107 F. Supp. 80 (1952), aff'd., 199 F.2d 758 (2 Cir.); 46 A.L.R. 2d 1185. Policyholders are general creditors of the insurance company in receivership, and as such are entitled to share ratably in the distribution of the

assets of the Company. However, they are expressly prohibited from receiving any preferential treatment.

This rule was made clear in the case of *Melco Systems v. Receivers of Transamerica Insurance Company*, 105 So.2d 43 (1958). [6946] In that case, the Supreme Court of Alabama held that the proceeds of a reinsurance agreement constituted general assets to which an insured had no priority over other creditors. All creditors had to share equally in the assets of the company and this included policyholders. *See also, Fletcher v. State Treasurer*, 16 Mich. App. 87, N.W. 2d 194 (1969). It is abundantly clear that the Treaty of Assumption and Bulk Reinsurance between the Receiver and Protective (with or without the Fifth Amendment) provides for unequal treatment to the policyholders and creditors of Empire and provides for preferential or priority treatment in many respects, some of which are as follows:

A. The Reinsurance Agreement provides for assumption of policy liabilities, subject to a 35% or more (now 50%) moratorium on withdrawable funds. Policyholders have the right to approve or disapprove and if they disapprove, then they file their claims as general creditors. If they approve, then they have the benefits of the reinsurance, subject to the aforementioned moratorium. Two million dollars is left with the Receiver out of the Empire assets to satisfy the claims of all general creditors, including the non-consenting policyholders and creditors who are not policyholders, and to pay the expenses of administration. There has been no determination as to the amounts of the claims of such general creditors (including non-consenting policyholders), nor has there been any determination as to what the expenses of administration

may be. A prior request for an accounting by the Receiver has been denied by this Honorable Court. Presumably it is contemplated that the Receivership will continue for 10 years, since the Treaty provides for the Receiver to pay his pro rata part of insurance policies upon the life of Moody prior to the cancellation of the moratorium. Obviously, no one can determine at this date that general creditors (including non-consenting policyholders) will have equal treatment to the treatment afforded consenting policyholders [6947] under the Reinsurance Agreement. They could fare worse or even better. No one knows and no one has even attempted to find out.

B. Under the Treaty, Protective has the right to file claims against the Two Million Dollar Fund aforementioned on behalf of the policyholders who consent to the reinsurance. The amounts paid on such claims are added to the Empire Fund. Quite obviously, this prefers such consenting policyholders over those who do not consent, since they are given the benefits under the Reinsurance Agreement and the benefit of a claim against the Two Million Dollar Fund. The non-consenting policyholders have only a claim against the Two Million Dollar Fund.

C. Under the terms of the Treaty, if an assumed policy becomes paid up after June 9, 1972, the cash value is used to buy the paid up insurance reduced by one-half the moratorium. If this same policy is later turned in for cash, then the cash value of the reduced paid up insurance is reduced again by the then moratorium amount. This charges such policyholders twice.

D. The amount of the moratorium under the Treaty is to be computed annually and gradually reduced. Attached hereto is a letter dated March 28, 1974 from the aforementioned Thomas K. Pennington to Dr. A. C. Olshen, Consultant to the Insurance Commissioner for the State of Texas to which is attached a projection by Protective of the first 10 years of operation after the Treaty becomes effective, and showing the reduction thereof. At the aforementioned hearing before the Honorable Judge Jones, Dr. Olshen testified that this periodic reduction in the moratorium had the effect of making the Reinsurance Treaty "semi-tontine", in that it gave policyholders who did not convert to cash or [6948] lapse their policies more than those who did, and in that the longer a policyholder held on to his policy, the more he would receive. Conversely, the sooner he converted to cash or lapsed, the less he would receive. This obviously provides for unequal treatment to policyholders, contrary to the Alabama law. This projection clearly illustrates that a policyholder who converts to cash during the first year of the effective date of the Treaty receives same subject to a 35% moratorium (now 50%). This amount is gradually reduced each year until the tenth year, at which time such policyholder would receive the full cash value of his policy without any moratorium deduction.

E. Under the Treaty, policyholders with participating policies must give up all their rights to dividends, except the United Founders policyholders, who are to continue to receive their dividends. This prefers them over the other policyholders.

F. Under the terms of the Treaty with Protective, the basis of the moratorium amounts for certain policies is the withdrawable funds thereof. With respect to other policies, the basis is the total values of separate accounts for such policies. For others, the basis is the total policy reserves less policy loans. Accordingly there are three different bases for moratoriums. The moratorium amounts on certain policies is 35% of the withdrawable funds; on others, it is 35% of the net reserves; and on others, it is 35% of the total value of separate accounts. This obviously provides for preferential treatment of certain policyholders over others.

G. Policyholders with matured endowments or coupons left on deposit with Empire prior to the effective date of the Protective Treaty are charged the full amount of the moratorium, but those whose endowments mature [6949] after the effective date, or whose coupons are left on deposit after the effective date are not so charged. This obviously prefers certain policyholders over others.

H. The Protective Treaty contained different dates for the determination of rights of various parties and thereby prefers certain policyholders and claimants over others.

5.

The Protective Treaty states that the moratorium on some of the policies has been based upon the withdrawable funds. However, both Dr. Olshen and Mr. Pennington testified at the aforementioned hearing to the effect that the withdrawable funds on the Empire policies have never been computed. If they had been computed, then Moody is informed and believes that the moratorium would have been only 7%, instead of the 35% (now 50%) provided in the Treaty.

6.

The Treaty provides that stocks and bonds of Empire, other than stocks of affiliates, shall be carried at statutory admitted book value by Protective in the Empire Fund. However, stocks of affiliates are to be carried only at their pro rata portion of the capital surplus of such companies, without giving any consideration to the cost of such stocks or the value of the insurance in force of such companies. This will require a substantial deduction in the amount of the Empire assets and thereby be detrimental to the policyholders of Empire.

7.

If the moratorium had been computed on the basis of the difference between the statutory admitted assets according to Empire's latest convention statement and its liabilities according to said statement (to-wit: the amount of the deficiency in statutory admitted assets) it would have been approximately 20%, as compared with the original 35% (now 50%) [6950] provided in the Treaty. Moreover, if it had been computed with any consideration for the value of the insurance business of Empire, there would have been no need for any moratorium. George V. Stinnes and Associates, Consulting Actuaries, value the Empire business for the Texas Insurance Commissioner in 1972 at $6,400,000. Under the terms of the Protective Treaty, Protective receives the entire benefit of the value of such business without any accounting to the policyholders, creditors or stockholders.

8.

Under the Protective Treaty various assets of Empire could be held until after the moratorium is cancelled and then sold

at substantial profits, all of which would inure to the benefit of Protective without any accounting to Empire policyholders, creditors or stockholders. Such assets include the stock owned by Empire in Investors Preferred Life Insurance Company and National Insurance Company of America.

9.

Under the Protective Treaty, the Empire assets are commingled with Protective assets, which makes it much more difficult for them to be accounted for. They should be separated and treated separately as Protective is now doing for assets of other insurance companies. In addition, under the Treaty, Protective does not have the responsibilities of a Trustee and it should have such responsibilities.

10.

It is provided in the Protective Treaty that if approvals cannot be obtained under the respective holding company acts for transfers of shares of Empire affiliates, then they will simply be held in trust for Protective. This is merely an attempt to do indirectly what cannot legally be done directly and appears to be a clear violation of such acts.

11.

Under the Treaty, Protective warrants that it is taking shares of subsidiaries of Empire for investment and not for [6951] distribution, but Moody is informed and believes that Protective publicly solicited sales of the shares of National Insurance Company of America and is privately negotiating (without public solicitation) for the sale of shares of Investors Preferred Life Insurance Company to a company represented by the ex-

insurance commissioner of the State of Texas who held office as such commissioner when a Receiver was appointed for Empire. The public solicitation of bids is contrary to Protective's representation in the Treaty. The private negotiations aforementioned are inconsistent with the public solicitation and discourages competitive bidding which should result in a higher price.

12.

Under the terms of the Treaty, any increase in the value of the Libbie Shearn Moody Trust inures to the benefit of Protective, rather than the policyholders, creditors and stockholders of Empire.

13.

Protective does not have an insurable interest on the life of Moody.

14.

A majority of the assets of the Receivership are in the State of Texas and a majority of the premium income of Empire is from policies upon persons who reside in the State of Texas. However, the Ancillary Receiver for the State of Texas is not a party to the Treaty and has no control or authority whatsoever under it.

15.

There is no provision under the Treaty for payment of expenses of administration by any of the ancillary receiverships from the Two Million Dollar Fund aforementioned.

16.

The Protective Treaty is expresly for the benefit of Empire,

Protective and the Receiver and expressly denys any [6952] rights or remedies to any other person, firm or corporation. This will have the effect of preventing policyholders who consent to the reinsurance from being third party beneficiaries to the reinsurance agreement or having any right to sue thereunder for any breach of contract by Protective.

17.

The assumption certificate attached as Exhibit "A" is not consistent with the various amendments to the Treaty, nor even the Treaty itself. For example, it states that the moratorium must terminate in 15 years. Moreover, it states that it affects only the cash surrender and loan values and those values relating to such values. This is not correct for the reason that it affects matured endowments and coupons left on deposit. The assumption certificate states that death endowment and maturity benefits would be paid in full. Certain of the death benefits are not to be paid in full under the Treaty and matured endowments left on deposit are not to be paid in full. The assumption certificate states that Protective has a right to terminate if an appeal is taken from any order approving the Treaty, but that right was waived under an amendment.

18.

It is unfair and a denial of due process to send assumption certificates to policyholders upon terms by which they are deemed bound unless they file a written objection within 60 days, especially since they have had no notice of the proceeding concerning the Treaty and no opportunity to object to the terms thereof.

19.

The amounts to be paid Protective during the period of moratorium for servicing the policies and handling the investments is excessive and unfair to the Empire policyholders.

20.

Under the trems of the Protective Treaty, the Libbie Shearn Trust is to be valued at only $4,250,000. This [6953] is the lowest of two values given in a 1968 appraisal by American Appraisal Company which call for periodic re-evaluations, none of which have been made. It is too low and unfair to the Empire policyholders.

21.

Under the terms of the Protective Treaty, Protective may receive the entire Twelve Million Dollars death benefits on policies on the life of Moody. This would amount to an unjust enrichment to Protective in the event of the untimely death of Moody.

22.

Under the terms of the Protective Treaty, the Empire assets are to always exceed by 5% the Empire liabilities. This gives Protective an increase in its surplus by 5% of Empire's assets at no cost. The Protective Treaty is unfair to the Empire policyholders, creditors and stockholders. It does not require Protective to put up or pay anything, except to make a guarantee that the moratorium will be cancelled in 10 years. According to Mr. Pennington's aforementioned letter to Dr. Olshen, it is projected that this will be accomplished by a reduction in the moratorium from the Empire operating earnings. Thus, according to the projections, Protective takes no risks whatsoever.

23.

In support of Moody's position aforementioned that the Libbie Shearn Moody Trust interest of Empire should be valued at a higher figure than $4,250,000, there has been previously filed in this Court an evaluation of such interest by Dr. Trosper.

24.

Moody is informed and believes that news releases concerning Empire disseminated prior to the appointment of a Receiver and contrary to the laws of the State of Alabama discouraged bidders from bidding upon the reinsurance of Empire's business by creating a wrongful impression that such [6954] business was worthless. Moody respectfully submits that new bids should be solicited.

25.

This Honorable Court approved the Protective Treaty after hearing testimony from Dr. A. C. Olshen to the effect that Empire had a lapse ratio of approximately 18%. However, according to the auditor for the State Board of Insurance for the State of Texas, Ora M. Davis, that ratio was only approximately 5%. (His letter to that effect is an exhibit in the recent hearing in the 53rd District Court, Travis County, Texas)

26.

At the aforementioned hearing before Judge Jones, the aforementioned Mr. Pennington testified that Protective expects to get between five and seven-and-a-half million dollars profit from its Treaty with the Receiver. This will be at the expense of Empire's policyholders, creditors and stockholders and rightfully belongs to them.

27.

According to the projection made by Mr. Pennington and attached to his letter dated March 28, 1974 to Dr. Olshen (a copy of which is attached) the 35% moratorium will have ended by its own cancellation in 10 years. Empire's policyholders, creditors and stockholders would be better off without any reinsurance and with the continuation of the current court imposed moratorium and operation of the company by the Receiver, for the reason that by Mr. Pennington's own figures and projection the moratorium would be ended from Empire's earnings in a period of not more than 10 years (at a 35% moratorium) and the company could then be returned to its policyholders, creditors and stockholders, intact and solvent with all residual values thereafter inuring to their benefifit rather than to Protective's benefit.

28.

[6955] Empire is solvent and there is no need for any reinsurance.

WHEREFORE, Shearn Moody, Jr. respectively requests leave to file additional objections and comments at a later date and he respectfully prays that the aforementioned petition of the Receiver be denied.

Respectfully submitted,

A. R. Schwartz
Box 129B Capitol Station
Austin, Texas

Attorney for Shearn Moody, Jr.

[4852] **PROTECTIVE'S EXHIBIT Number 6**

"PROPOSED TREATY OF
ASSUMPTION AND BULK REINSURANCE
EMPIRE LIFE INSURANCE COMPANY
OF AMERICA"

PROTECTIVE LIFE
INSURANCE COMPANY
HOME OFFICE — BIRMINGHAM, ALABAMA

[4853] **Executed in 3 Counterparts of which this is Counterpart No. 2.**

TREATY OF ASSUMPTION AND BULK REINSURANCE

This Agreement is made and entered into in Birmingham, Alabama, as of this 31st day of May, 1974, effective as stated hereinbelow, by and between JOHN C. BOOKOUT, Commissioner of Insurance, State of Alabama (herein the "Receiver") in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation (herein "Protective").

I. *Identity of Protective.* Protective was incorporated under the laws of the State of Alabama on July 24, 1907, is qualified to do business as a capital stock legal reserve life and health insurance company and had capital and surplus of $25,969,339.96 as shown in its 1972 Annual Statement, of which $19,369,339.96 was indicated as surplus, and as of September 30, 1973 had approximately $26,013,065 of capital and surplus. The executive offices of Protective are located in Birmingham Alabama.

II. *Identity of Empire; Consideration.* Empire was incorporated under the laws of the State of Alabama on June 27, 1963. At its inception and at various dates thereafter Empire both assumed business from, and ceded business to, various other insurance companies as well as directly issuing life, health and accident and annuity policies. By order of the Circuit Court for the Tenth Judicial Circuit of Alabama (herein "Court") in Equity Case No. 171-687, entered June 29, 1972, Empire was

found to be impaired and the Honorable John G. Bookout, Commissioner of Insurance, State of [4854] Alabama, was named Receiver. The Receiver having determined that the full rehabilitation of Empire did not appear feasible, the Receiver has advertised under order of the Court dated September 12, 1973, for proposals for assumption of the outstanding insurance policies of Empire, and this Agreement is submitted in response to such advertisement and shall constitute a firm and binding contract with Protective when and if accepted by the Receiver and approved by order of said Court, provided, however, that if not so accepted and approved by January 31, 1974 (unless such time be hereinafter extended in writing by Protective), this Agreement shall be null and void and of no further effect.

III. *Effective Date.* The Effective Date of this Agreement shall be 12:01 A.M., C.S.T., on the ..... day of ....., 197 ..., which shall not be a date prior to January 1, 1974.

IV. *Definitions.* As hereinafter used, the following terms shall have the meanings set out below and none other:

A. "Empire Policies" shall mean (1) all life insurance, accident and health and annuity contracts or policies which have been either (i) issued by Empire prior to the Effective Date of this Agreement or (ii) assumed by Empire prior to June 29, 1972, and (iii) which had not been ceded by Empire to, and assumed by or purportedly assumed by, some other company prior to June 29, 1972, (2) all supplemental contracts issued by Empire as [4855] a consequence of the policies defined in (1) above, and (3) all supplemental benefits or riders issued in connection with the policies defined in (1) and (2) above. It is expressly understood that the term "Empire Policies" shall not refer to any policy issued on Protective forms as a result of

conversion privileges or purchase options contained in Empire Policies.

B. "Old National Policies" shall mean only that specific block of paid-up insurance which had been written or assumed by Empire and which on or about June 19, 1967, Empire ceded to Old National Insurance Company, Montgomery, Alabama, an Alabama corporation (herein "Old National") and Old National assumed in a reinsurance agreement. Inasmuch as Old National has been found to be insolvent and the receiver of Old National is seeking to set aside and declare void the assumption of the Old National Policies from Empire and is asserting that such policies are the liability of Empire, the "Old National Policies" are a subject of this Agreement as set forth hereinbelow.

C. "Withdrawable Funds" shall mean any funds that may be withdrawn under the terms of a policy by voluntary action of the insured or other owner of such policy and shall normally be equal to the policy cash value plus the cash value of any paid-up additions, any dividend accumulations, any pure endowment accumulations or coupon accumulations, any prepaid premiums on the policy and any contingent pure endowment payments, less all outstanding policy loans.

[4856] D. "United Founders Treaty" shall mean that certain Reinsurance Treaty entered into by Empire and Republic Investors Life Insurance Company, East Molene, Illinois, now called United Founders Life Insurance Company of Illinois (herein "United Founders") on or about April 3, 1968.

E. "Assumed Policies" shall mean Empire Policies, Old National Policies, the United Founder Treaty and any policies

assumed by Protective after the Effective Date hereof as a result of or arising out of the administration of the Empire Assets (as defined in Section IX.A.).

V. *Cession and Transfer by Receiver.* The Receiver on behalf of Empire agrees to transfer, assign, cede, deliver and convey, and does hereby transfer, assign, cede, deliver and convey, to Protective, by way of total reinsurance, subject to the terms, conditions and provisions hereof, (1) all of the rights, privileges and prerogatives of Empire in and to those certain policies and contracts of insurance identified herein as Old National Policies and Empire Policies, (2) all rights, claims and interests which Empire has against, or in the receivership estate of, Old National, whether on account of attempted or actual recission of the 1967 reinsurance agreement referred to in Section IV.B. or otherwise, and (3) all of the rights, privileges, prerogatives, contracts, agreements and treaties of reinsurance and/or co-insurance (without assumption) with other insurance companies covering risks of Empire reinsured and/or co-insured with other insurors and covering risks of other [4857] insurors ceded to and reinsured and/or co-insured (without assumption) by Empire in effect on the Effective Date hereof, including, but without limitation, all rights and interests of Empire under the United Founders Treaty.

Receiver further agrees to transfer to Protective, subject to the terms, conditions and provisions hereof, all assets of Empire except as specified hereinbelow in Section VII, and agrees to execute any and all documents and take all other action deemed advisable by Protective to effectuate or facilitate the transfer of assets or other assignments and transfers contemplated by this Section V.

Protective agrees to accept the assets so transferred and assigned subject only (without assumption) to the mortgages and other liens and encumbrances thereon but only to the extent that the same are disclosed in Empire's 1972 Annual Statement.

VI. *Assumption by Protective.* Protective does hereby reinsur and assume as of the Effective Date (subject to the terms, conditions and provisions, and only to the extent as, hereinafter specifically provided) the liability of Empire under the Empire Policies and, if any, under the Old National Policies (except as provided hereinbelow), subject, however, to any and all defenses or offsets against the claims and actions on said policies which would have been available to Empire or Old National (as applicable) had this Agreement [4858] not been made, and further does hereby assume as of the Effective Date (subject to the terms, conditions and provisions, and only to the extent as, hereinafter specifically provided) all of the rights, privileges, prerogatives, contracts, agreements, treaties or reinsurance and/or coinsurance with other insurors (without assumption) referred to in Section V and the obligations thereunder. The terms and conditions of such assumption are as set forth below in this Section VI and in the remaining provisions of this Agreement:

A. *Old National Policies.* Protective shall endeavor to enter into an agreement with the receiver of Old National to assume the Old National Policies subject to the terms and conditions hereinbelow in Sections VIII, VII and XIV and agree that, if such an agreement cannot be reached, a court of arbitration shall be appointed consisting of three arbitrators, one selected by the Commissioner of Insurance, State of Alabama, one by the Commissioner of Insurance, State of Texas, and one by Protective, and such court of arbitration shall, after a hearing, draft

a reinsurance agreement as to the Old National Policies not inconsistent with any provision contained in this Agreement which shall be binding on said receiver and Protective but limited to policyholder liabilities arising from the Old National Policies. The terms and provisions of Section XVII, except as to the composition of court, shall apply. After the proper execution of such reinsurance agreement [4859] on behalf of Old National with all necessary Court or regulatory agency approvals thereof, and after the effective date of such agreement, for the purposes of this Agreement, Old National Policies shall be thereafter considered to be Empire Policies as defined.

After the Effective Date hereof and prior to the effective date of such an agreement, if any, Protective shall pay valid claims under the terms of said Old National Policies on account of deaths occurring on and after the Effective Date (and prior thereto as specified in Section VI.E. below) to the extent that such claims have not been previously paid by either Empire or Old National; provided, however, that (1) Protective shall have all defenses or offsets against claims and actions upon said policies which would have been available to Old National or Empire had this Agreement not been made, (2) no such payment or payments shall be deemed evidence of, or any admission that, the Old National Policies are Protective's obligations to any greater extent than they were liabilities of Empire prior to this Agreement or that Protective is hereby or otherwise assuming any greater obligations on account of Old National Policies than Empire had prior to the Effective Date hereof or otherwise, and (3) that payment of such claims by Protective shall be taken into account and allowed for in any reinsurance agreement with Old National's receiver.

Protective further agree that, as described [4860] further in Section VIII.C. below, any amounts received by Protective from Old National's receiver on account of recission of the 1967 Empire-Old National reinsurance agreement shall be applied to reduce the Moratorium Amounts otherwise applicable to Old National Policies and shall be included in the Empire Assets for the purposes of accounting under this Agreement, all as provided for hereinafter.

B. *United Founders Treaty*. Protective agrees to assume Empire's obligation to United Founders under the United Founders Treaty subject to the moratorium provisions set forth below in Section VIII relating to such treaty. Protective further agrees to assume Empire's obligations under Paragraph 10 of the United Founders Treaty to administer directly under certain conditions the United Founders policies related thereto. Protective agrees that in the event it shall be required under said Paragraph 10 to so administer policies or if it shall elect under Paragraph 12 of said treaty to assume directly the United Founders policies related thereto, there shall be no change in the status of the policyholder thereof nor shall any moratorium be placed in effect against them. In the event of such assumption, the policies so assumed by Protective shall be considered to be "Empire Policies" for all purposes of this Agreement except that they shall not be subject to the provisions of Sections VIII and XII relating to Moratorium Amounts and revision of dividend provisions.

[4861] C. *Third Party Indemnity Reinsurance Agreements*. Protective accepts and assumes as of the Effective Date all right, title and responsibilities of Empire under "third party indemnity reinsurance agreements" by which is meant those reinsurance

and/or co-insurance agreements with other insurance companies covering risks of Empire reinsured and/or co-insured with other insurors, without assumption, and covering risks of other insurors ceded to and reinsured and/or co-insured by Empire, without assumption. It is not the intention of the parties to affect, nor shall any provisions of this Agreement be construed as affecting, in any way, such reinsurance of a portion of the risk under some of the Empire Policies with any third party reinsuror under existing indemnity reinsurance agreements between Empire and such companies, although Protective expressly reserves the right, and anticipates that it shall exercise the right, under the recapture clause contained in said agreements to adjust the retention on the Empire Policies to Protective's retention levels.

D. *Reinstatement*. Protective agrees to assume Empire's obligation to reinstate any policy which is or should have been in the classes assumed under this Agreement which on the Effective Date hereof by its terms was entitled to reinstatement, provided that all requirements necessary to procure reinstatement of such a policy under its terms are fulfilled to the satisfaction of Protective. Upon such reinstatement of any such lapsed [4862] policy, it shall for all purposes be treated as if it had been in force from the date on which it lapsed except that it shall be subject to all of the terms and conditions of this Agreement as may pertain to the class of policy in which it was or should have been.

E. *Pending and Unreported Claims*. Protective agrees to assume Empire's liability in connection with all outstanding claims on Empire Policies or Old National Policies, whether in process of settlement or incurred but not yet reported as of the

Effective Date, provided, however; that Protective does not assume liability on any claim which has heretofore been rejected by Empire or Old National, as applicable, whether or not such claim is being contested in the courts, it being understood that any contingent liability on account of any such rejected claim shall remain the liability of Empire or Old National, as applicable.

F. *Commissions.* Protective agrees to assume Empire's liability with respect to any commission due for premiums collected by Empire before June 29, 1972, but only to the extent that such commission was included in the liabilities reported in the Annual Statement of Empire as of December 31, 1972 and reflected on Empire's books and records. It is expressly understood that Protective is not assuming any obligation for commissions not reflected on such Annual Statement or due on account of premiums collected after June 29, 1972 or to be collected in the future.

[4863] G. *Liabilities Not Assumed.* Protective does not assume any liability to policyholders, stockholders or creditors of Empire or Old National not specifically set forth above. In amplification but without limitation of the generality of the forgoing statement, Protective does not assume any liability and shall have no liability for:

1. Any obligation of Empire on account of agreements entered into with other companies under which Empire ceded, and such companies assumed or purportedly assumed, policies issued or assumed previously by Empire (except as set forth in Section VI.A. above).

2. Any claim by creditors of Empire on account of any obligation not arising out of any policy or contract specifically assumed above.

3. Any claim by any person, firm or corporation on account of any guaranty or endorsement or other agreement by Empire with respect to funds borrowed by or advanced to employees, subsidiaries, affiliates or any person, firm or corporation, related or unrelated, whether or not Empire had guaranteed or endorsed such advances or loans prior to the Effective Date hereof.

4. Any dividend claimed by any policyholder of American Trust Life Insurance Company or by any other person, firm or corporation, which dividend was not (a) previously declared by Empire and (b) either (i) paid to the policyholder or (ii) included in the provision for dividend accumulations or for paid-up additions, as shown [4864] in Empire's Annual Statement of December 31, 1972. Any such claim alleged on account of any policy, whether or not such policy is assumed by Protective under this Agreement, shall be the sole liability of Empire.

5. Any surplus debenture or other evidence of indebtedness whatsoever issued by Empire or by any company and assumed by Empire prior to the Effective Date hereof.

6. Any obligation for commission which may have been due on account of premiums collected or to be collected after June 29, 1972.

7. Any and all obligations for unpaid premium taxes.

8. Any deficiency with respect to any mortgage on real estate transferred to Protective.

VII. *Assets to be Transferred.*

A. The Receiver on behalf of Empire agrees to transfer, assign, deliver and convey to Protective, and take all necessary action and execute all appropriate documents to convey to Protective good and merchantable legal title to, all assets of Empire, except that Receiver may retain the sum of Two Million Dollars ($2,000,000) in cash or liquid assets to be used to pay the expenses of the receivership and to satisfy creditors for liabilities not assumed by Protective hereunder. In the event that the Receiver shall have settled with all such creditors and there shall be left to the account of Empire under the administration of the Receiver any funds, then if Moratorium [4865] Amounts (as defined) are still outstanding against any policies which are the subject of this Agreement or if the Moratorium Amounts shall have been cancelled on account of the expiration of the fifteen year period referred to in Section VIII.D.3. below, then such funds in the account of Empire shall be transferred to Protective to be added to the Empire Fund (as defined below) for use in further reducing the outstanding Moratorium Amounts or to reimburse Protective for any prior reduction of Moratorium Amounts pursuant to the terms hereinafter set forth.

B. If, as of the Effective Date hereof, Protective shall not have received authorization under the respective Insurance Holding Company System Regulatory Acts of Nebraska or Arkansas, or both, to assume control of Lincoln Life and Casualty Company or of Investors Preferred Life Insurance Company, respectively, then the Receiver shall, as escrow agent for the benefit of Protective, continue to hold all Empire's shares of common stock of National Insurance Company of America or Investors Preferred Life Insurance Company, as the case may be, in trust

for Protective until such authorization has been obtained, and when so obtained the Receiver shall transfer the shares evidencing said common stock to Protective as promptly as practicable. With respect to all securities to be transferred by Receiver to Protective, Protective hereby represents to Receiver that it is taking said securities for [4866] investment and not with a view to distribution.

C. The assets of Empire to be transferred to Protective shall be valued for statutory purposes and in determination of the amount of the Empire Fund (as defined) as follows:

1. *Bonds, Real Estate, Mortgages, Collateral Loans and Preferred Stocks.* Empire's bonds, real estate, mortgages, collateral loans and preferred stock shall be transferred to Protective at a value equal to their admitted asset value to Empire on the Effective Date hereof. Said value, adjusted thereafter as required by proper statutory accounting, shall be used in determining the admitted asset value to Protective of such assets and in determining the value of the Empire Fund.

2. *Common Stocks.* All commonstocks owned by Empire shall be transferred to Protective at their market value as of the Effective Date hereof and shall be valued thereafter in determining the value of the Empire Fund at the market value at the valuation date in question, except that stock of "affiliates", as defined in the Alabama Insurance Holding Company Systems Regulatory Act, shall be valued in accordance with Section 3 thereof, and provided further, if there is no readily ascertainable market value for a common stock, Protective shall make a reasonable attempt to obtain a reasonable value for such security, which value shall be its value for Empire Fund purposes. However, if a value for a common stock cannot [4867] be reasonably

obtained, such stock shall be treated as having no value for Empire Fund purposes but shall remain an asset of the Empire Fund.

3. *Furniture, Equipment and Supplies.* In lieu of any separate accounting for all furniture, equipment and supplies of Empire, Protective shall credit the Empire Fund with One Thousand Dollars ($1,000) and shall have no obligation thereafter to account for such assets in the Empire Fund or otherwise for the purposes of this Agreement.

4. *Agents' Debit Balances.* No value shall be placed on the agents' debit balances of Empire; however, any amounts recovered on account of such balances shall be credited to the Empire Fund.

5. *Libbie Shearn Moody Trust Interests.* For the purposes of Protective's Annual Statement and the determination of the amount of the Empire Fund, the interest in said Libbie Shearn Moody Trust shall be valued at that certain value established by the N.A.I.C., that is, Four Million Two Hundred Fifty Thousand Dollars ($4,250,000). Protective shall be entitled to increase or decrease such stated value if it appears warranted, provided, however, that such adjustment must be acceptable or required for statutory accounting purposes in Protective's Annual Statement. Receiver represents and warrants to Protective that (i) the Libbie Shearn Moody Trust is a valid and enforceable trust with a duration at least as long [4868] as the life of Shearn Moody, (ii) Empire has a valid, enforceable and assignable right to 40% of the life interest of Shearn Moody in one-eighth (1/8) of the income of said Trust, and (iii) those certain insurance policies issued on the life of Shearn Moody by Empire State Life Insurance Company of Houston, Texas, designated as

Policy Nos. YT-206948-A, YT-208415 and 69YT-208623, assumed on December 31, 1972 by National Western Life Insurance Company, Denver, Colorado, each containing provisions providing for renewal of such coverage until the policy anniversary nearest the insured's sixty-fifth birthday and providing total death benefits in the event of Shearn Moody's death in the amount of Twelve Million Dollars ($12,000,000.00) shall be in force on the Effective Date hereof on a premium paying basis with premiums due thereon paid to the next policy anniversary of each such policy, and the Receiver further agrees that ownership of these policies shall be transferred to Protective and that Protective shall be named the sole beneficiary under all such policies.

6. *Other Assets.* All other assets shall have the normal values assigned to them pursuant to statutory accounting principles and practices.

It is expressly recognized by the parties to this Agreement that the foregoing valuation methods and the values expressed therein or derived thereby are for purposes of statutory accounting and determination of the amount of the Empire [4869] Fund and shall not be construed as constituting stipulated values for federal income tax purposes. For federal income tax purposes, the value of the foregoing assets shall be determined in accordance with the normal accounting principles and practices for such transactions. It shall be assumed that the value utilized for such assets in federal income tax returns of Protective shall be the value to Empire for tax accounting purposes of these assets.

VIII. *Moratorium.* Inasmuch as the assets of Empire are insufficient to meet its liabilities including reserves, it is necessary to, and Protective shall, place a moratorium against the

Withdrawable Funds under the policies assumed by Protective hereunder in accordance with the following agreements:

A. *Basis of Moratorium Amounts.*

1. With respect to policies described in Section IV.A. and IV.B. and not described hereinbelow in this paragraph A, the initial Moratorium Amount shall be determined based on the Withdrawable Funds of the policy as of the Effective Date hereof and a policy without Withdrawable Funds shall not be subject to any moratorium. However, for the purposes of determining the initial Moratorium Amount of any policy, any policy loan requested of Empire subsequent to June 29, 1972 shall be disregarded.

2. With respect to the separate accounts maintained on account of policies issued by Empire [4870] Life Insurance Company of America, Little Rock, Arkansas, on Form PSIP-1, the Arkansas separate account, and by National Union Life Insurance Company on Form SPP50, the Alabama separate account, the initial Moratorium Amount as of the Effective Date hereof shall be figured against the total values of those separate accounts and if any amount is allocable to a policyholder under the terms of any such contract, the pro rata portion of the then current Moratorium Amount relating to the total separate account involved shall also be allocated to such policyholder. If the amount of the accumulation of any such policyholder in the separate account is to be paid out in cash, such payment shall be reduced by such Moratorium Amount and the acceptance of such amount by the policyholder or other recipient shall constitute full release of Protective with respect to the Moratorium Amount retained. If the amount of such payment is to be added to the dividend accumulating otherwise credited to such policy,

which shall constitute the standard procedure in such case unless the policyholder specifically requests otherwise in writing, then the Moratorium Amount shall be added to and increase the Moratorium Amount otherwise outstanding on such policy.

3. With respect to the United Founders Treaty, the initial Moratorium Amount shall be calculated based upon the total policy reserves on policies covered by such treaty, less the total policy loans and net deferred and uncollected [4871] premiums as of the Effective Date (hereinafter said adjusted total policy reserves being referred to as "Net Reserves").

B. *Effect of the Moratorium.*

1. With respect to those policies described in Section IV.A and IV.B., the moratorium shall not affect any contractual policy benefit except as provided under Section XII with respect to dividends and except as provided below with respect to cash surrenders, policy loans, partial withdrawals, policy conversions or similar policy options and privileges, and determination of nonforfeiture benefits, and the moratorium shall reduce these benefits as follows:

(a) If such a policy is surrendered, the applicable Moratorium Amount shall be deducted from the cash value otherwise payable under the terms of the policy. Acceptance of such reduced cash value by the policyholder shall be a total release of all claims against Protective on account of or in any way arising out of the policy. If any policy shall contain a provision under which the policyholder may continue such policy as paid-up insurance, in whole or in part, without supplying evidence of insurability, or may take a cash payment in lieu thereof, regardless of the description in the policy of such

payment, it shall be construed as a cash surrender for purposes of the moratorium.

[4872] (b) The Moratorium Amount, while not requiring interest, shall otherwise be treated as an addition to any outstanding policy loans for the purposes of applying any policy provisions relating to or referring to policy loans, conversions, exchanges, and similar options and privileges, except that it shall not reduce any death benefit or any benefits payable on maturity of the policy as an endowment other than as specified in subsection (a) above.

(c) If a policyholder has any option, right or privilege to withdraw any amounts from the policy prior to maturity, such option, right or privilege shall only permit withdrawal of funds otherwise available in excess of the Moratorium Amount.

(d) If the policy shall be placed on reduced paid-up or extended term insurance, the amount of the reduced paid-up or the amount and period of such extended term insurance, as the case may be, shall be computed based upon a value equal to the value specified to be used in the policy reduced by one-half of the then applicable Moratorium Amount. The death benefit thus reduced shall not be increased thereafter on account of any subsequent reduction in the Moratorium Amount. The current Moratorium Amount shall be continued against such paid-up insurance, subject [4873] to reduction as provided in Section VIII.D. below, and shall be deducted from the cash surrender value of such paid-up insurance if it shall be surrendered before Moratorium Amounts are cancelled and likewise shall be deducted for the purposes of determining available policy loan values. Notwithstanding the

foregoing, the reinstatement provisions of the policies shall still be effective.

(e) Any policy which became reduced paid-up or extended term insurance after June 29, 1972 and prior to the Effective Date shall have benefits based upon the foregoing provisions except that the Moratorium Amount shall be computed on Withdrawable Funds as of the date such reduced paid-up or extended term insurance became effective.

2. With respect to the United Founders Treaty, no death benefits shall be affected; however, any cash surrender value payable to United Founders under the terms of the Treaty on account of the surrender of a policy covered by such Treaty shall be reduced by an amount equal to the product of such cash value times a fraction the numerator of which is the then current Moratorium Amount on the Treaty and the denominator of which is the then current Net Reserve under the Treaty, both values being computed as of the date of surrender of such policy. The Moratorium Amount of the Treaty shall be reduced by the amount of such cash surrender value reduction. Such cash [4874] surrender value reduction shall be permanent and United Founders shall have no further claim against Protective on account of such policy surrender, whether or not the Moratorium Amount is subsequently reduced as hereinafter provided for. With respect to policy loans under the United Founders Treaty, inasmuch as the Treaty makes no specific provision for participation by Empire in policy loans prior to the assumption date of any such insurance by Empire but Empire has been participating in such policy loans, any policy loans after the Effective Date hereof shall be solely for the account of United Founders and United Founders shall bear all increase in aggregate out-

standing policy loans thereafter from its own assets until such time as the ratio of the aggregate outstanding policy loans borne by United Founders on policies under the Treaty (whether incurred before or after the Effective Date hereof) to the aggregate outstanding policy loans on such policies equals the ratio of the then current Moratorium Amount on the Treaty to the total Net Reserves under the Treaty. Thereafter, Protective shall share proportionally in future policy loans. In the event Protective directly assumes the policies covered by the Treaty, United Founders shall not be reimbursed by Protective in any way on account of existing policy loans at the time of assumption.

C. *Moratorium Amounts.*

1. With respect to those policies described in Section IV.A., the initial Moratorium [4875] Amount shall be thirty-five percent (35%) of the Withdrawable Funds as of the Effective Date.

2. With respect to the separate accounts, the initial Moratorium Amount shall be thirty-five percent (35%) of the total value of those accounts at the Effective Date.

3. With respect to the United Founders Treaty, the initial Moratorium Amount shall be thirty-five percent (35%) of the Net Reserves under the Treaty as of the Effective Date.

4. With respect to the Old National Policies, the initial Moratorium Amount shall be one hundred percent (100%) of the Withdrawable Funds and shall so remain even if Moratorium Amounts on other policies are lowered, until the reinsurance agreement between Protective and the receiver of Old National referred to in Section VI.A. is effective. As of the effective date of such reinsurance agreement, the Moratorium Amount on each Old National Policy shall be adjusted to be equal to the product

of the Withdrawable Funds multiplied by a fraction the numerator of which is the sum of (1) the reserves for all in-force Old National Policies; plus (2) all claims incurred on such policies after June 19, 1967 which were paid by Protective or Empire or which Protective is hereby obligated to pay after the effective date of such reinsurance agreement, less (3) the value of any assets transferred by the receiver of Old National to Protective pursuant to such reinsurance agreement, and the denominator of which is the [4876] reserves for all in-force Old National Policies. Such Moratorium Amount for any of the Old National Policies shall not exceed one hundred percent (100%) of the Withdrawable Funds of the policy as of the effective date of such reinsurance agreement.

D. *Reduction and Cancellation of Moratorium.*

1. If the Empire Fund, as described in Section IX, shall exceed one hundred five percent (105%) of the Empire Liabilities as defined in Section X less the then outstanding aggregate Moratorium Amounts as of December 31 of any year, then as of April 1 of the following year, all the then outstanding Moratorium Amounts shall be proportionally reduced to such an amount that, as of such December 31, the Empire Fund would have equaled one hundred and two percent (102%) of the Empire Liabilities less the outstanding reduced Moratorium Amounts.

2. If after any such adjustment as described in D(1) next above, the then outstanding Moratorium Amounts shall be less than one hundred twenty percent (120%) of one year's annual premium on all premium paying Empire Policies in force on such December 31, all outstanding Moratorium Amounts shall be cancelled on April 1, and Protective shall thereafter pay all

policy benefits in full except as hereinafter provided in Section XII with respect to dividends and except with regard to policies with reduced paid-up or [4877] extended term benefits elected after June 29, 1972 and prior to such cancellation.

3. If there are any Moratorium Amounts outstanding at the expiration of a period of fifteen (15) years after the Effective Date of this Agreement, all such Moratorium Amounts shall be cancelled.

4. Protective shall have the right at any time and from time to time to voluntarily reduce or eliminate any or all Moratorium Amounts, in its sole discretion, whether or not required by any provision hereof.

5. When all Moratorium Amounts are cancelled, Protective shall be relieved from any responsibility or accountability for separate fund accounting for any policy previously affected by the Moratorium Amounts hereunder.

E. *Statutory Treatment of Moratorium Amount.* The Moratorium Amounts shall be treated as a credit against the reserve on the applicable policies in the Annual Statements of Protective.

IX. *Empire Fund.* The "Empire Fund" shall consist of:

A. The "Empire Assets" which shall include:

1. All assets, other than cash or equivalents and other than the furniture, equipment and supplies described in Section VII.C.3 transferred to Protective under Section VII hereof prior to the disposal thereof by Protective;

[4878] 2. Property acquired by Protective from the disposal of property otherwise defined as an "Empire Asset" or transferred to Protective by the receiver of Old National under the provisions of Section VI.A.; and

3. Policy loans and net due and deferred premiums on Assumed Policies, plus

B. A share in Protective's fixed income investments, sometimes referred to as "commingled assets", the amount and yield of which shall be determined as follows:

1. Cash and equivalents transferred to Protective but not included in the assets under Section IX.A.1. above, plus the $1,000 stipulated payment under Section VII.C.3. shall be treated as invested as a part of all fixed income investments made by Protective in the first calendar quarter after the Effective Date hereof, and such assets shall be assumed to have the same yield as the average of all such investments made in said quarter.

2. Thereafter, an amount shall be treated as invested during the year in which the same becomes available, which amount is equal to the sum of (i) the profits to Protective on disposal of any Empire Asset, plus (ii) the increase [4879] in Empire Liabilities, plus (iii) the Empire Operating Earnings (as hereinafter defined) or less the losses thereof, plus (iv), in the year received, any cash transferred to Protective by the receiver of Old National under the provisions of Section VI.A. or from the Receiver of Empire under Section VII.A. on account of settlement of all outstanding creditor claims or under Section XIV, less (v) losses on disposal of Empire Assets, and less (vi) decreases in Empire Liabilities, said sum to be increased or decreased, as applicable, by the change in total value of Empire Assets other than that change caused by revaluation

of any Empire Assets. This amount shall be invested and commingled with Protective's fixed income investments for said year and shall be credited thereafter with the yield equal to the average long term fixed yield rate obtained by Protective on its fixed income investment made in the year such amount is treated as invested (as information, this rate was 9.21% in 1971, 9.23% in 1972 and is anticipated to be between 8% and 9% in 1973). If the amount calculated as specified hereinabove in this subparagraph (2) is negative, the Empire Fund shall be debited as if a portion of the commingled [4880] assets referred to above had been sold and the adjustment to yield on commingled assets due to such assets deemed to have been sold shall be determined on the basis set forth above.

C. The requirements for maintenance of the Empire Fund while any Moratorium Amounts are outstanding shall in no way limit Protective's right, in its sole and absolute discretion, to dispose of any of the Empire Assets as it may deem desirable or advisable.

X. *Empire Liabilities.* "Empire Liabilities" shall equal:

A. All reserves and other liabilities of Protective arising from the Assumed Policies; plus

B. Any debt, loss reserves or other liabilities of Protective either existing at the Effective Date hereof or arising thereafter on account of the Empire Assets.

XI. *Empire Operating Earnings.* "Empire Operating Earnings" for any year will be determined as equal to:

A. (1) premiums and other considerations received by Protective on Assumed Policies less any third party indemnity

reinsurance premiums paid by Protective on Assumed Policies; plus

(2) investment income on the Empire Fund which shall be all investment income received on account of Empire Assets plus the assumed yield on the commingled assets described [4881] in Section IX.B., less investment expenses defined below in Section XI.D.; plus

(3) any miscellaneous income received by Protective in connection with the Assumed Policies, less the sum of:

B. (1) all benefits and dividends paid on the Assumed Policies; plus

(2) the increase in Empire Liabilities for the year; plus

(3) premium taxes incurred on the Assumed Policies; plus

(5) an expense allowance for Protective equal to ten dollars ($10.00) per premium paying Assumed Policy and five dollars ($5.00) per paid-up Assumed Policy in force at the begining of the year; plus

(6) any extraordinary expenses arising out of the Assumed Policies which would not normally be incurred in the course of the transaction of life insurance business by Protective, including those expenses involved in maintaining and operating an office in Dallas, Texas and the current data processing system used by Empire until administration of the Assumed Policies can be efficiently transferred to Protective's Birmingham Main Office, plus the identifiable costs of such transfer.

C. Empire Operating Earnings shall be increased or decreased, as appropriate, by the [4882] marginal change in Protective federal income tax liability arising as a result of

the consummation of this Agreement or from Empire Assets, Empire Liabilities and Empire Operating Earnings in the current year.

D. "Investment Expenses" as used hereinabove shall be equal to the sum of:

(1) all out-of-pocket expenses specifically incurred in connection with the Empire Assets, including, but not limited to, all expenses incurred in connection with the administration of real estate transferred to Protective by Empire, and

(2) premiums paid on insurance policies covering the life of Shearn Moody and protecting Protective's life interest in the Libbie Shearn Moody Trust as described in Section VII.C.5. hereof, and

(3) 5.5% of all investment income credited in Section XI.A.2. above, as an administrative charge for supervision of such investments.

E. Protective shall have the right to use reasonable approximations in making the calculations called for by the foregoing provisions. To the extent not otherwise specifically provided for in the foregoing, such amounts shall be calculated in accordance with statutory insurance accounting principles and practices as used in Protective's Annual Statement.

XII. *Dividend Provisions Superseded.*

A. *Revision of Dividend Provisions.* Certain policies assumed by Empire from American [4883] Trust Life Insurance Company specifically included provisions by rider or in the basic policy which specified dividend levels as a percent of earnings on American Trust Life business. Empire assumed such obligations upon assumption of such policies but Protective is not

willing to assume such obligations. Other policies either issued or assumed by Empire, by policy provision, written or implied sales materials or oral representations may have created similar obligations or created the expectation of similar obligations on the part of the insured, and Protective is not willing to accept and assume any such obligation. Therefore, as a condition precedent to the assumption of any policy by Protective under this Agreement, it is agreed that the owner of any Assumed Policy which is participating or in any other way has a claim against the earnings of the issuer thereof expressly must agree, and by failure to reject the Certificate of Assumption as hereinafter provided such policyholder shall be deemed to have agreed to the following reformation, modification and amendment of each such policy with regard to the payment of dividends:

1. If a policy is participating or contains any provision which may be construed to be a claim upon the earnings of the company issuing or assuming the policy or the policyholder of such policy claims any such right for any reason, the following provision shall be substituted for any or all such provisions of the existing policy:

[4884] *Dividends.* Any dividend paid on this policy shall be as declared in the sole and absolute discretion of Protective and no contractual provision or written or oral promise, express or implied, heretofore made to the policyholder shall bind Protective to declare or pay any dividend. Protective may, in its sole and absolute discretion, declare no dividend or a dividend in such amount as it may deem advisable.

2. Each person not expressly rejecting, and thereby accepting, an assumption agreement from Protective pursuant to

the terms hereof shall be deemed to have released Protective (1) from any and all obligation under such policy or otherwise to declare any dividend whatsoever on such policy and (2) any liability for any misrepresentation or fraud of any person with respect to any statement regarding dividends on the policy.

However, the foregoing shall not be construed to apply to the guaranteed minimum of ten dollars ($10.00) per One Thousand Dollars ($1,000) "dividend" provided under Form PSIP, the President's Special Investors Plan, issued by Empire Life Insurance Company of America, Little Rock, Arkansas and assumed by Empire, which dividend commitment is in the nature of a pure endowment or coupon benefit and accordingly will be paid by Protective in the same manner as such benefits.

[4885] B. *Contingent Paid-Up Additions.* Protective has no obligation to declare dividends on any participating policy of Empire. If, however, in its sole and absolute discretion, Protective should determine that dividends of some amount should be paid to such policyholders while Moratorium Amounts are still outstanding, it is hereby specifically agreed that Protective may declare contingent paid-up addition dividends prior to the time all Moratorium Amounts are removed as provided in Section VIII.D. above but a declaration of such dividends shall in no respect be deemed to be a waiver by Protective of its right not to declare such a dividend at any time in the future or on any other policies. Such contingent paid-up addition dividends shall provide an increase in death benefit in the event the insured shall die while such contingent paid-up addition dividends are outstanding on the policy. However, in the event the policyholder shall surrender his policy or elect a reduced paid-up or extended term insurance benefit under the nonforfeiture provisions of any such policy, the policyholder shall lose all claim on such contingent paid-up additions and Protective shall have no further obligation on account thereof. Such contingent paid-up additions shall cease to be contingent when all Moratorium Amounts have been cancelled on all policies and at that time shall become regular paid-up additions. The determination of equitable treatment between classes of policyholders shall be made in the sole and absolute [4886] discretion of Protective.

C. *Dividends After the Moratorium Period.* Protective agrees that when all Moratorium Amounts have been cancelled, it shall attempt to place any of the Assumed Policies that are then participating on a basis of substantial equity with similar policies issued by Protective at the same time as the Assumed Policy but only with respect to dividends for those years after the amount of the Empire Fund shall exceed the amount of the Empire Liabilities. Such dividends shall be payable only at the sole and absolute discretion of Protective and the policyholder shall be entitled to elect any form of dividend payment option normally available to Protective's participating policyholders; however, if no option election is filed with Protective after the Effective Date hereof and prior to such dividend payment, the paid-up addition option shall be deemed to have been elected. The determination of a basis of substantial equity between classes of policyholders shall be in the sole and absolute discretion of Protective.

XIII. *Assumption Certificates.* Protective agrees that, as promptly as possible after the Effective Date hereof, it shall issue to each policyholder whose policy is reinsured by it hereunder an assumption certificate dated as of the Effective Date

and substantially in form and with the provisions set out in Exhibit "A" attached hereto and made a part hereof [or with such modifications as may be approved by the Receiver], [4887] subject to (i) the written terms and conditions of each such policy, as modified by this Agreement and (ii) any and all offsets, counterclaims, cross-actions and defenses which are now or may hereafter become available to Empire or Protective, and all such offsets, counterclaims, crossactions and defenses held, owned or possessed by Empire are hereby transferred, assigned and conveyed by it and the Receiver to Protective. Such assumption certificate shall be mailed by Protective by first class mail addressed to the policyholder at the address shown upon the records of Empire.

XIV. *Right to Reject Assumption.* It is specifically recognized and agreed by the parties hereto that each of the policyholders of any policy which is the subject of this agreement has a valid claim against the receivership estate of Empire in an amount equal to the Withdrawable Funds of his or her policy. Each policyholder affected by this Agreement shall have the right and privilege of an election either to accept in full the terms of this Agreement and the assumption certificate or to reject the same in full in writing by filing such rejection at the office of John G. Bookout, Receiver, within sixty (60) days after such assumption certificates are mailed to policyholders. All policyholders who have not so rejected this Agreement and the assumption certificate within such period shall be conclusively deemed and considered to have accepted all provisions of this Agreement and the assumption certificate and to [4888] have further agreed that Protective, on behalf of all such policyholders against whose policies and contracts any moratoriums

have been placed, shall have the right to file a claim with the Receiver in the amount of the total of the moratoriums. Any dividend distributions on such claim received by Protective from the Receiver shall be added by Protective to the Empire Fund. It is agreed and understood that Protective shall have no obligation with respect to such claim or the prosecution or collection thereof other than the filing thereof with the Receiver and the acceptance and application, as described above, of any dividend distributions Protective may receive as a result of such claim. Protective agrees to transfer to the Receiver assets equal in value to the assets herein transferred to Protective covering the reserves on policies of such policyholders who may reject this Agreement and assumption certificate within the period specified above, less the applicable Moratorium Amount on each such policy. Any such policyholder rejecting this Agreement and the assumption certificate by giving written notice thereof to the Receiver within such period will be entitled to make his own claim directly to the Receiver and shall receive no benefit under or by virtue of this Agreement.

XV. *Premiums and Other Receipts.* All premiums and payments on any policies assumed by Protective which are paid by the policy owners on and after the Effective Date hereof shall be [4889] the sole property of Protective, and neither the company, nor receivership estate thereof, from which such policies were so assumed shall have any right, title or interest therein. All moneys, checks, drafts, money orders, postal notes, and other instruments received by the Receiver for premiums on the policies assumed under this Agreement and attributable to periods after the Effective Date shall be forthwith transferred and delivered to Protective and any such instruments when so

delivered shall bear all endorsements required to effect the transfer of same to Protective. The Receiver and Protective agree that Protective shall have all of the rights of Empire under outstanding bank draft authorizations from policyholders which authorized Empire to draw on the policyholders' bank accounts to pay premiums on the policyholders' insurance policies transferred by the Receiver to Protective, so far as permitted by the laws of the applicable states, and Protective, as part of this Agreement, assumes the guaranty obligations of Empire with respect only to such bank draft authorizations outstanding as of the Effective Date hereof. Protective shall have the right and authority to collect for the account of Protective all receivables and other items which shall be transferred by the Receiver to Protective and to endorse without recourse and without warranties of any kind the name of Empire on any checks or other evidences of indebtedness received by Protective on account of any such receivables or other items. [4890] Receiver agrees to execute all documents or instruments as may be necessary to assure that any endorsement in accordance with the provisions of this paragraph by Protective of Empire's name shall be recognized and accepted. The Receiver agrees that he will transfer and deliver to Protective any cash or other property that the Receiver may receive with respect to such receivables or other items.

XVI. *Records.* The Receiver agrees to deliver to Protective all of Empire's files and records relating to policies ceded hereunder and assets transferred hereunder. Protective agrees that the Receiver shall be entitled to inspect, audit and copy any and all of such records thereafter if needed to carry out the further duties of the receivership.

XVII. *Arbitration Clause.* All disputes or differences between the two contracting parties arising under or relating to this Agreement upon which an amicable understanding cannot be reached shall be decided by arbitration pursuant to the terms of this section, except that the court of arbitrators for the matters set forth in Section VI.A. of this Agreement shall be constituted as provided therein.

The court of arbitrators provided for herein shall place a liberal construction upon this Agreement in light of the prevailing customs and practices for reinsurance in the life insurance industry, free from legal technicalities, for the purpose of carrying out the intent of the [4891] parties.

The court of arbitrators, which shall be held at the home office of Protective in Birmingham, Alabama, shall consist of three arbitrators who must be officers of life insurance companies familiar with the reinsurance business, other than Protective.

Within thirty (30) days of written demand of either party to arbitrate any dispute arbitrable under this Section XVII, each of the parties shall appoint an arbitrator, notifying the other party of the name and address of such arbitrator. The two arbitrators so appointed shall thereupon select a third arbitrator. If either party shall fail to appoint an arbitrator as herein provided, or should the two arbitrators so named fail to select a third arbitrator within thirty (30) days of their appointment, then, in either event, the President of the American Life Insurance Association or its successor shall appoint such second and/or third arbitrator. The three arbitrators so selected shall constitute the court of arbitrators.

A decision of a majority of said court shall be final and

binding and there shall be no appeal therefrom. The court shall not be bound by legal rules of procedure or evidence but shall establish its own procedures and receive evidence in such a way as to do justice between the parties. The court shall enter an award which shall do justice between the parties and the award shall be supported by written opinion.

[4892] The costs of arbitration, including the fees of the arbitrators, shall be borne by the losing party unless said court shall decide otherwise.

XVIII. *Conditions Precedent.* In addition to any other conditions precedent to Protective's obligations hereunder which may have been hereinabove set forth, Protective shall have the right, in its sole discretion, prior to the Effective Date hereof, to terminate and render void this Agreement, without liability to any person therefor or hereunder, upon the failure of the Receiver to tender or furnish to Protective, no later than five (5) days before said Effective Date, except with respect to (a) which shall be furnished fourteen (14) days before said Effective Date, any one or more of the following:

(a) (i) the Trust Agreement and related documents establishing that the Libbie Shearn Moody Trust is a valid and enforceable trust with a duration at least as long as the life of Shearn Moody and (ii) all documents necessary to show a valid, enforceable and assignable right in Empire to 40% of the life interest of Shearn Moody in one-eighth (1/8) of the income of said trust;

(b) duly executed, legally binding and assignable notes from the policyholders for each policy loan (except premium loans) shown on Empire's books [4893] with the face amount of none of such loans exceeding, except nominally,

the cash surrender value of the respective policy (tender at the Empire home office shall be deemed compliance with this provision);

(c) evidence that all notes and mortgages to be transferred to Protective are valid and binding; evidence of full fire and extended coverage insurance on the real property subject to such mortgages; and evidence of the assignability thereof to Protective;

(d) title binders from approved solvent title insurance companies on all real estate with individual values in excess of $100,000 to be transferred to Protective sufficient to insure Protective's title in amounts not less than those shown in Empire's 1972 Anual Statement with respect to each parcel of real estate and showing Empire's ownership to be free and clear of all liens and encumbrances except those disclosed in Empire's 1972 Annual Statement;

(e) all equity and debt securities of Empire to be transferred hereunder in form for transfer (except to the extent provided for in Section VII.B. hereof), free and clear of all liens and encumbrances except as disclosed in Empire's 1972 Annual Statement;

[4894] (f) a schedule of all assets to be transferred; and

(g) (i) evidence that the representations of the Receiver contained in Section VII.C.5. are true and (ii) the policies on the life of Shearn Moody referred to in Section VII.C.5. in the full amount stated therein, and forms with all signatures thereon necessary for assignment to Protective as owner and beneficiary as of the Effective Date.

Protective shall further have said right to terminate prior to

the Effective Date upon the occurrence of any of the following facts (or opinion in the case of subparagraph (c)):

(a) that those assets of Empire to be transferred are not those shown in the 1972 Annual Statement or assets of equivalent value substituted therefor, except that certain assets may be or may have been sold under Court order between December 31, 1972 and the Effective Date and the cash proceeds thereof shall constitute part of the $2,000,000 not to be transferred;

(b) that there has been at any time up to the Effective Date any damage, destruction or loss not fully covered by insurance materially and adversely affecting any assets to be transferred to Protective;

[4895] (c) that, in the opinion of counsel for Protective, the interest in the Libbie Shearn Moody Trust agreed to be transferred is not valid and enforceable for the lifetime of Shearn Moody or is not assignable to Protective by Empire.

Protective may, without prejudice to its rights otherwise under this Agreement, waive one or more of such conditions in a separate writing executed by its President.

XIX. *Conditions Subsequent.*

A. Protective shall have the right to terminate and rescind this Agreement and the assumption certificates, and upon recission, Protective shall be absolutely relieved of all of its obligations thereunder, upon the happening of either of the following occurrences at any time within the time periods set forth below:

(i) any timely appeal from any order of the Circuit Court for the Tenth Judicial Circuit of Alabama in Case No. 171-687;

(ii) any lawsuit filed in any court in which a claim is made attacking this Agreement or its validity, whether or not Protective is a party to such lawsuit; provided that such lawsuit is filed within six (6) months of the entry of the final order of the Circuit Court for the Tenth Judicial Circuit of Alabama in Case No. 171-687 approving this [4896] Agreement.

Upon the occurrence of the filing of an appeal as described in subparagraph (i) or a lawsuit as described in subparagraph (ii), Protective shall have fifteen (15) days following written notification to Protective by the Receiver (or any other written notice in fact received by Protective) of the filing of such an appeal or of such a lawsuit to elect to terminate and rescind this Agreement pursuant to this Section. If Protective shall fail to make such election to terminate and rescind this Agreement within said period of fifteen days, its obligations hereunder shall remain in full force and effect notwithstanding any such appeal or lawsuit.

B. In the event that any court shall enjoin or otherwise order or decree (preliminary or otherwise) Protective not to perform any or all of its obligations incurred under this Agreement, for however long as such injunction, order or decree shall be outstanding, Protective shall be absolutely relieved from performing any obligation incurred hereunder to the extent that such performance would result in a violation of any such injunction, order or decree; provided that Protective shall use its best efforts to have any such injunction, order or decree dissolved and set aside.

XX. *Other Provisions.*

1. This Agreement shall inure to the benefit of and be

binding upon the successors and assigns of Empire, Protective and the Receiver.

2. All prior or contemporaneous agreements [4897] and representations are merged into this Agreement, which, together with the exhibit hereto, constitutes the entire contract between the parties. No amendment or modification hereof shall be of any force or effect unless in writing and signed by the parties.

3. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Alabama, except that it is agreed that the provisions of Section VI.A. and Section XVII, relating to arbitration of disputes hereunder, shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

4. Nothing herein, express or implied, is intended, or shall be construed, to confer upon or give any person, firm or corporation, other than Protective, Empire and the Receiver, any rights or remedies under or by reason of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of the day and year first above written.

John G. Bookout, Commissioner of
Insurance, State of Alabama, as
Receiver for Empire Life Insurance
Company of America.

ATTEST:
W. C. Brannon
Secretary

PROTECTIVE LIFE INSURANCE COMPANY
By Wm. J. Rushton
President

[4898]

EXHIBIT "A"

CERTIFICATE OF ASSUMPTION

INSURED:_____

ORIGINAL POLICY NUMBER_____

ASSUMPTION NUMBER_____

This is to certify that Protective Life Insurance Company, pursuant to a Treaty of Assumption and Bulk Reinsurance (herein "Treaty") between John G. Bookout, Commissioner of Insurance, State of Alabama, as Receiver for Empire Life Insurance Company of America, Montgomery, Alabama, and Protective Life Insurance Company ("Protective"), hereby assumes all liability under the policy described above issued or assumed by Empire Life Insurance Company of America, in accordance with the conditions and terms hereof but subject to the more detailed terms and conditions specified in said Treaty, as of 12:01 A.M., C.S.T., the _____ day of _____, 197____, subject to any defenses available to Empire Life Insurance Company of America on said date.

Whereas, Empire Life Insurance Company of America was insolvent as of the effective date of the Treaty and the assets of said Empire Life Insurance Company of America were insufficient to provide all benefits to policyholders and to pay all creditors, the Treaty imposes certain limitations on the rights of the policyholder of the policy assumed hereunder. Acceptance of such limitations by the policyholders is a condition precedent to this Certificate of Assumption becoming effective. [4899] Accompanying this assumption certificate is a summary of the

more important terms of the Treaty affecting the policyholder. Upon written request prior to December 31, 1975, Protective will supply the policyholder with a copy of the complete text of the Treaty, which is on file with the Commissioner of Insurance, State of Alabama. Among the conditions precedent to this assumption is the imposition of a temporary moratorium against the withdrawable values of this policy. The initial amount of the moratorium is 35% of the withdrawable values as of the effective date of the Treaty. This moratorium amount can never increase. The moratorium must terminate, at the latest, fifteen years from the date of the assumption; it may be cancelled prior to that time and under certain conditions may be reduced as often as annually. Such moratorium affects only the cash surrender and loan value, those options and privileges relating to such values (such as conversion, exchange, and partial withdrawal) and nonforfeiture benefits under the policy. Death and endowment at maturity benefits will be paid in full.

As a further condition precedent to the effectiveness of this assumption certificate, if the policy for which this certificate is issued is a participating policy or if for any other reason a claim may be asserted by virtue of said policy against the earnings of Empire Life Insurance Company of America, any predecessor or successor thereto, the Treaty specifically requires that all [4900] such dividend provisions, whether written or claimed to be implied, are amended by substitution of the following:

Dividends. Any dividend paid on this policy shall be as declared in the sole and absolute discretion of Protective and no contractual provision or written or oral promise, express or implied, heretofore made to the policyholder shall

bind Protective to declare or pay any dividend. Protective may, at its sole option, declare no dividend or a dividend in such amount as it may deem advisable.

And furthermore it is required that the policyholder acknowledge that by failure to reject the assumption certificate he releases Protective from any claims, whether sounding in fraud, misrepresentation or otherwise, which might have heretofore been made by him or on his behalf relating to any dividend with respect to the policy. All premiums falling due subsequent to _____ shall be paid to, and all correspondence relating to this policy should be directed to, Protective Life Insurance Company at its home office in Birmingham, Alabama.

Protective shall have the right to terminate the Treaty and void this assumption certificate if enjoined by court order or if, within six (6) months of the approval of the Treaty, an appeal is taken against any order of the court [4901] which approved the Treaty or any lawsuit attacks the Treaty or its validity.

The policyholder may reject this assumption by filing such rejection in writing at the office of John G. Bookout, Receiver, Department of Insurance, Administration Building, Montgomery, Alabama 36104, within sixty (60) days after this assumption certificate was mailed. As a consequence of such rejection, this assumption shall be void and the policyholder will retain his rights against the receivership estate of Empire Life Insurance Company of America.

IN WITNESS WHEREOF, Protective Life Insurance Company has caused this certificate to be executed in its name and on its behalf by William J. Rushton, III, its President, and

attested by W. C. Brannon, its Secretary, both being thereunto duly authorized.

ATTEST:

W. C. Brannon
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

By Wm. J. Rushton
President

[4902] FIRST AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

John G. Bookout, Commissioner of Insurance, State of Alabama (herein the "Receiver"), in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and Protective Life Insurance Company, Birmingham, Alabama, an Alabama corporation (herein "Protective"), hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974, as follows:

1. The provisions of Paragraph III are hereby stricken and the following provisions are substituted therefor:

The Closing Date of this Agreement shall be June 1, 1974 unless such Date be hereafter extended in writing by Protective.

This Agreement shall not become effective or be binding on Protective in any way unless and until the Receiver shall have accomplished (1) the tender or furnishing of each and every item enumerated in Paragraphs VII D and XVIII hereof within the time limits therein specified as amended and (2) the transfer and assignment to Protective of all of the assets (or cash in lieu of assets) required to be transferred to Protective hereunder on or before the Closing Date. [4903] If the Receiver shall fail to have completely accomplished either (1) or (2) within said time limits, this Agreement shall never become effective and shall be totally null and void. Upon the Receiver's completely accomplishing both (1) and (2), this Agreement shall be effective as of

12:01 A.M., C.S.T. on January 1, 1974, which shall be deemed to be the Effective Date of this Agreement.

However, it is expressly agreed by the Receiver and Protective that during the period between the date upon which this Agreement is approved by the Court and the Closing Date, Protective, to the extent practicable, shall administer the affairs of Empire, invest such investable assets that are transferred to it prior to the Closing Date and otherwise be empowered to act as if the Agreement was closed except as to the provisions of Paragraph XIII, and all actions taken by it in good faith shall be binding on the Receiver in the event this Agreement does not become effective.

2. Paragraph VII A at line 5 on page 14 is amended by striking the words "fifteen year period" and substituting therefor the words "ten year period." Paragraph VIII D (3), line two, is amended by striking the words "fifteen (15) [4904] years" and substituting therefor the words "ten (10) years."

3. The provision at the end of Paragraph VII C (5) begining with the words "and the Receiver further . . ." in the middle of the fourth line from the end of Paragraph VII C (5) on page 17 of the Agreement and ending with the words "under all such policies" at the end of Paragraph VII C (5) is stricken.

4. Paragraph VII is amended by adding the following as subparagraph D:

D. *Life Insurance*

1. On or before the Closing Date, the Receiver shall transfer possession of each of the insurance policies described in Paragraph VII C (5) above to Protective and shall assign to Protective absolutely and irrevocably the right to receive death

proceeds from such policies in the amount of $4,350,000 subject only to adjustment as provided in subparagraph D (3) below. Notwithstanding said transfer of possession of the policies, the Receiver shall remain the owner and beneficiary of said policies. Not less than 15 days prior to the Closing Date, the Receiver shall have accomplished all things necessary to: (1) make such assignments of proceeds to Protective in a form and with content acceptable to the issuer of said policies; [4905] (2) receive written acknowledgments from the issuer of notice of assignment; (3) provide for the absolute right by Protective to pay upon non-payment by the Receiver, prior to cancellation of any of such policies, the premiums of any and all of such policies upon written notice by the issuer that the Receiver has failed to pay any such premium; and (4) furnish satisfactory written evidence to Protective of having accomplished (1), (2) and (3).

2. Protective shall have first priority to any and all death proceeds paid under such policies up to the amount of said proceeds assigned to Protective. Should, for any reason, the death proceeds paid under said policies be less than the full face amount of said policies, nevertheless, Protective shall be entitled to and shall receive the whole amount of proceeds assigned hereunder (as may be adjusted) and there shall be no pro rata reduction of the proceeds payable to Protective on account of any failure to pay the entire proceeds of said policies.

3. On or before June 1 of each calendar year after 1974, the Receiver and Protective shall adjust the amount of the assignment of proceeds of said [4906] policies made hereunder so that such assignment equals the then current value

of the interest of Protective in the Libbie Shearn Moody Trust assigned hereunder as reflected in Protective's annual statement for the preceding year filed with the Alabama Department of Insurance plus any retained risk amount by Protective under said policies either as a result of assumption or as a reinsurer.

4. The Receiver shall pay all premiums on such policies and do all things necessary to keep each of said policies in full force and effect at all times. Upon a written statement from the Receiver, Protective shall reimburse the Receiver anually for Protective's pro rata share of such premiums based upon the ratio of death proceeds assigned to Protective to the total death benefits payable under such policies for such year.

5. If Protective, upon non-payment by the Receiver, pays the premiums on any of said policies, the Receiver shall immediately, free of any further consideration, transfer and assign all of said policies to Protective, free and clear.

6. The Receiver agrees to do all things reasonably within his power to [4907] obtain agreement of the National Western Life Insurance Company of Denver, Colorado and of the North America Life Insurance Company of Houston, Texas so that Protective may directly assume the interests of said companies in such policies and acquire from North America all of its rights under treaties of reinsurance relating to such policies between North America and Connecticut General Life Insurance Company and Lincoln National Life Insurance Company.

7. Receiver agrees that should he or the Court decide to reduce or terminate the Receiver's interest in such insurance policies, he shall offer to assign and transfer to Protective free of any further consideration such interest in such policies as both owner and beneficiary as the Receiver or the Court determines should be relinquished and if Protective accepts such offer of transfer, Protective shall thereafter be responsible for all premiums on such policies. It is recognized that any decision by Protective with respect to such additional insurance shall be at its sole discretion, and Protective shall become the sole owner of and be named the sole beneficiary under any such part of insurance assigned. The Receiver shall not assign his interest [4908] either as owner or beneficiary in any of said policies to any third party. Upon termination of the Receivership, the Receiver, upon the election of Protective in its sole discretion, shall transfer, assign and convey his entire interest as both owner and beneficiary of each of said policies to Protective free of any further consideration from Protective to the Receiver. Protective shall thereafter have sole discretion with respect to all matters concerning said policies, including, without limitation, the cancellation or reduction of benefits under said policies but shall also be responsible for all premiums on such policies.

8. No part of this amendment shall diminish the right of Protective under Paragraph XI D (2) to charge any and all premiums paid by Protective on such insurance as an investment expense of Empire. And benefits received under such policies by Protective shall be treated as assets added to the Empire Fund, or as Protective assets if the moratorium created hereunder has expired.

5. Paragraph VII is amended further by adding the following as subparagraph E:

E. The Receiver shall transfer, assign, deliver and convey to Protective all of the assets to be transferred [4909] hereunder on or before the Closing Date, provided that to the extent that the Receiver is, for reasons beyond his power and control, not able to transfer and assign title to one or more of such assets he shall, in lieu of any such asset, pay to Protective on the Closing Date such amount of cash as shall equal the value of any and all assets not transferred as any such asset or assets are valued pursuant to the provisions of Paragraph VII C hereof. Said cash shall be held by Protective in escrow, but upon the Receiver transferring any asset not transferred at closing to Protective within two years from the Closing Date, Protective shall repay the Receiver such amount of said escrow funds as shall equal the value (as determined under Paragraph VII C) of any such asset transferred. Upon the expiration of two years from the Closing Date, any and all such funds in escrow shall vest in Protective absolutely and thereafter it shall have all right, title and interest thereto, and the Receiver shall have no further obligation to transfer the assets whose value is represented by such escrow.

6. Paragraph VIII D (1), line two, is [4910] amended by striking the words "one hundred five percent (105%)" and substituting therefor the words "one hundred eight percent (108%)," and Paragraph VIII D (1), line nine, is amended by striking the words "one hundred two percent (102%)" and substituting therefor the words "one hundred five percent (105%)."

7. The term "Effective Date" is amended to read "Closing Date" in the second line of Paragraph XIII and wherever it appears in Paragraph XVIII.

8. Paragraph XVIII(e) (p. 43) is stricken in its entirety. The last three lines of Paragraph XVIII(g) beginning with the words, "and forms with . . ." are stricken in their entirety.

9. Paragraph XIX A shall be stricken in its entirety and in place of said provision the following shall be added:

A. The parties recognize that this Agreement will be executed pursuant to an Order of the Court in the case of *State of Alabama ex rel John G. Bookout, Comm'r v. Empire Life Insurance Co.*, Case No. 171-687 in the Circuit Court for the Tenth Judicial Circuit of Alabama, In Equity, and the Receiver cannot guarantee that the validity of this Agreement, in whole or in part, or any [4911] order in Case No. 171-687 relating to this Agreement may not be made an issue either in further proceedings in said case, including an appeal, or in other legal proceedings presently pending or hereafter to be filed.

The Receiver is unwilling to condition this Agreement on there being no such appeal or collateral proceeding, but hereby agrees to and shall reimburse Protective from the fund created for the Receiver in Article VII hereof for all expenses, including attorneys' fees up to a maximum of $15,000 without Court approval and for such amounts in excess of $15,000 as the Receiver and the Court shall approve, which Protective might incur on or after December 5, 1973 as a result of the protection of its interests, or in cooperation with the Receiver in protecting their joint interests, in Case No. 171-687 or in

any appeal of Case No. 171-687 (whether or not Protective be a party thereto) or in any collateral legal proceeding affecting (i) this Agreement, (ii) any order in Case No. 171-687 or (iii) otherwise affecting the affairs of Empire to which Protective may be a party or, if not a party, have an interest therein.

The Receiver and Protective agree [4912] to cooperate in any legal proceeding in which their interests may be aligned relating to this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of this 31st day of May, 1974.

John G. Bookout, Commissioner of Insurance,
State of Alabama, as Receiver for Empire Life
Insurance Company of America.

ATTEST:

Wm. C. Brannon
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

Wm. J. Rushton
President

[4913] SECOND AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama (herein the "Receiver"), in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation (herein "Protective"), hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974 ("Agreement"), as follows:

Recitals

1. Since Protective submitted the Agreement for acceptance by the Receiver, material developments have occurred with respect to Empire. Specifically, but without limitation, the assignability of Empire's interest in the Libbie Shearn Moody Trust has been questioned in a lawsuit filed by Shearn Moody, Jr. against The Moody National Bank and Empire in the District Court of Galveston County, Texas, and the hearing in the Circuit Court for the Tenth Judicial Circuit of Alabama for approval of liquidaion of Empire as recommended by the Receiver and for acceptance of the Agreement, originally set for February 13, 1974, has been postponed until April 8, 1974, pending notification by mail of each Empire stockholder of the hearing. Protective offered the Agreement [4914] on the express condition that it be accepted by the Receiver and approved by the Court on or before January 31, 1974, and it is now apparent that such acceptance and approval cannot occur until after the hearing to be held April 8, 1974.

2. Protective desires to extend the time in which such accep-

tance and approval may be made through June 1, 1974, but only if the Receiver will agree to make appropriate adjustments in the initial Moratorium Amount established in Section VIII of the Agreement if it is determined that events transpiring since January 31, 1974 have adversely affected the condition of Empire and if the Receiver will enter into the other agreements expressed herein.

3. In Section VI of the Agreement, Protective agreed to reinsure the Old National Policies subject to mutual agreement on the terms of such reinsurance. Since submitting the Agreement, the Receiver has insisted that the initial Moratorium Amount with respect to each Old National Policy to be reinsured be determined on the same basis as that of the Empire Policies to be reinsured. The value of assets to be transferred to Protective for the reinsurance of the Old National Policies and the reserves which must be established for such policies have not been determined by the parties, and the Receiver can make no warranty or assurance at this time that sufficient assets can be transferred from Old National to justify an initial Moratorium Amount for the Old National Policies equal to that [4915] of the Empire Policies. The parties therefore desire to make clear that some upward adjustment in the initial Moratorium Amount for all Assumed Policies may have to be made if Protective is to reinsure the Old National Policies with an initial Moratorium Amount equal to that of the Empire Policies.

Agreement

NOW, THEREFORE, in consideration of the premises and the respective agreements of the Receiver and Protective herein contained, they hereby agree as follows:

1. The date for acceptance and approval of the Agreement as provided in Section II, p. 2 of the Agreement is extended to and through, but not beyond, June 1, 1974.

2. Immediately upon the acceptance of the Agreement, as amended, by the Receiver and its approval by the Court, but prior to the Effective Date, the Receiver shall transfer to Protective and Protective, as agent of the Receiver, shall assume possession and control of, and dominion over, all of the assets of Empire other than the Receiver's fund created in Section VII of the Agreement. Thereafter, Protective may, on behalf of the Receiver, sell, dispose of, transfer, assign, invest, reinvest, and otherwise manage any and all of said assets, subject only to such restrictions as may be placed upon Protective by the Court by written order. The Receiver shall do all things necessary [4916] or desirable to accommodate Protective's administration of said assets hereunder. Said assets, while in the possession and control of Protective prior to the Effective Date shall not constitute a trust fund and shall not be subject to any laws, rules or restrictions which apply to investment of trust funds. It is expresaly agreed that no claim of whatsoever kind will be made against Protective for alleged errors in judgment made in good faith in the management, sale, disposition, and reinvestment of said assets.

It is recognized by the Receiver that the interests of Empire will be best served by allowing Protective to commingle cash and equivalents received upon initial transfer to Protective of Empire assets or from the sale or transfer of Empire assets or from income produced by such assets or policies into fixed income investments (bonds, preferred stock, mortgages and similar investments) made by Protective in the management of its own

funds. Therefore, the Receiver hereby requests and authorizes Protective to commingle such cash and equivalents into Protective's fixed income investments and invest same in the same manner as Protective invests its own funds without segregating Empire's share from that of Protective. The value of Empire's share in such investments made with commingled funds shall be determined as provided in Section IX.B of the Agreement. Should Protective re-transfer Empire assets to the Receiver as provided for herein, [4917] the value of Empire's share in such commingled assets shall be computed as provided in Section IX.B and Protective shall re-transfer to Empire cash and/or fixed income assets (valued at their admitted value to Protective) purchased after transfer of the Empire assets hereunder, selected by Protective in its discretion, equal to the value of Empire's share so computed. Any dispute under the provisions of this paragraph shall be resolved by arbitration as provided in Section XVII of the Agreement.

3. Protective shall assume possession and control of and dominion over all Assumed Policies and, without reinsurance, shall administer all Assumed Policies. Such administration shall be carried out as if the Agreement were fully effective, subject to such modifications as the Court may prescribe, except that Protective shall reinsure no such policy and all payments on such policies shall be as if the Moratorium provisions of the Agreement required an initial Moratorium Amount based on 50% of the Withdrawable Funds of the policies as of September 15, 1972 rather than the 35% of the Withdrawable Funds as of the Effective Date. It is further agreed that unless paragraph 6 of this Second Amendment becomes effective, the initial Moratorium Amount of any Assumed Policy under the Agreement

shall not exceed fifty per cent (50%) of the Withdrawable Funds as of September 15, 1972.

4. To facilitate transfer of said possession, control and dominion under paragraphs 2 and 3 hereof, the Receiver shall transfer such [4918] of Empire's documents, records and other papers to Protective's offices in Birmingham, Alabama as Protective shall request. Protective shall at all times maintain appropriate books, records and ledgers with respect to said assets and policies, which shall be open to inspection of the Receiver or the Court and their representatives at any reasonable time.

Protective shall be empowered to change any and all procedures and records (including, without limitation, those relating to data processing) now in use by Empire as Protective, in its sole discretion, shall deem advisable.

The Receiver shall pay to Protective annually a fee for such administration prior to the Effective Date of the Agreement which (regardless of whether the Agreement otherwise becomes effective) shall be equal to the amount provided Protective after the Agreement becomes effective as set forth in Sections XI.B.5 and 6 and in Section XI.D to the extent the expenses specified in Sections XI.B.6 and XI.D.1 and 2 are not directly paid out of Empire funds.

5. Except as provded in the first four paragraphs of this Second Amendment, all of Protective's obligations under the Agreement as amended are expressly conditioned upon the determination by Protective that Empire's entire interest in the Libbie Shearn Moody Trust, as described in the Agreement, may be validly, lawfully and irrevocably assigned to Protective free and clear of any lawful or equitable claim or restriction. In

making such determination, Protective may rely [4919] exclusively on the opinion of its General Counsel, Cabaniss, Johnston, Gardner, Dumas & O'Neal. Upon such determination made by Protective in writing and delivered to the Receiver and upon the satisfaction in full of all other conditions to the Agreement as twice amended, all of Protective's other obligations under the Agreement shall forthwith become effective.

6. Except as provided in the first four paragraphs of this Second Amendment, prior to any of Protective's obligations under the Agreement as amended becoming effective and binding, Protective and the Receiver shall evaluate changes in the condition of Empire occurring after February 1, 1974, including, without limitation, lapses in premium-paying policies and any changes in the value or nature of Empire assets. If for any reason the condition of Empire has changed adversely from such date so as to justify an increase in the Moratorium Amount, Protective and the Receiver shall endeavor in all good faith to agree on the amount of such increase. If Protective and the Receiver fail to agree either that Empire's condition has changed adversely or on the amount the Moratorium Amount shall be increased, any such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement. It is expressly understood that nothing herein is intended to or shall result in reduction of the Moratorium Amount.

[4920] 7. Except as provided in the first four paragraphs of this Second Amendment, prior to any of Protective's obligations under the Agreement as amended becoming effective and binding, Protective and the Receiver shall determine as accurately as then possible the value of assets transferred or to be

transferred from Old National to Protective with respect to the reinsurance of the Old National Policies and the Empire Liabilities, as defined in Section X of the Agreement, on account of such policies. If the fair market value of the assets is insufficient in light of these liabilities on the Old National Policies to provide an initial Moratorium Amount consistent with that established for the Empire Policies, then Protective and the Receiver in all good faith shall seek to agree upon an appropriate increase in the initial Moratorium Amount for all Assumed Policies. If Protective and the Receiver fail to agree either that the value of the assets to be transferred is insufficient for reinsurance of the Old National Policies on the basis of such initial Moratorium Amount or, after such determination of insufficiency of value of assets, upon an appropriate increase in the initial Moratorium Amount, such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement. It is expressly understood that nothing herein is intended to or shall result in a reduction in the initial Moratorium Amount as provided in Section VIII.A of the Agreement.

[4921] 8. The Effective Date, which was set as January 1, 1974 in the first amendment, shall be redetermined by mutual agreement of the Receiver and Protective to reflect the date on which all the conditions set forth in the Agreement, the first amendment and this amendment are fully met. If all such conditions, including, without limitation, the condition stated in paragraph 5 of this Second Amendment, are not fully met by March 1, 1975, Protective may, at its sole option, terminate this Agreement effective forthwith and, upon ninety (90) days' written notice to the Receiver, re-transfer possession and control of all Empire assets and Policies transferred to Protective,

in which case all the terms and conditions of the Agreement shall forthwith be void and of no effect whatsover, it being understood that the fee payable to Protective for administration shall be paid during such ninety day period. If all of such conditions are met prior to March 1, 1975 and if Protective and the Receiver shall fail to agree upon a revised Effective Date, such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of this 31st day of May, 1974.

JOHN G. BOOKOUT

John G. Bookout, Commissioner of Insurance, State of Alabama, as Receiver for Empire Life Insurance Company of America.

ATTEST:

W. C. BRANNON
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

By WM. J. RUSHTON III
Its President

[1330] **Executed in 3 Counterparts of which this is Counterpart No. 2.**

THIRD AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

JOHN B. BOOKOUT, Commissioner of Insurance, State of Alabama, in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership, and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation, hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974, as follows:

1. The time for acceptance and execution of this Treaty by the Receiver is hereby extended to and through June 24, 1974.

2. It is agreed that this Treaty and each of the three amendments thereto shall be executed in three counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of May 31, 1974.

JOHN G. BOOKOUT

John G. Bookout, Commissioner of Insurance, State of Alabama, as Receiver for Empire Life Insurance Company of America.

ATTEST:

W. C. BRANNON
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

By WM. J. RUSHTON III
Its President

[6714]AGREEMENT TO EFFECTUATE TREATY OF ASSUMPTION AND BULK REINSURANCE

Charles H. Payne, Commissioner of Insurance, State of Alabama, (herein "Receiver") in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), Herbert Crook, Ancillary Receiver of Empire for the State of Texas (herein "Ancillary Receiver"), and Protective Life Insurance Company, Birmingham, Alabama, an Alabama corporation, (herein "Protective") hereby enter into the following Agreement (herein "Agreement to Effectuate Treaty") in order to effectuate the Treaty of Assumption and Bulk Reinsurance dated May 31, 1974, as four times amended (herein "Agreement").

1. As used herein, the following terms shall have the meanings set out below and none other:

(a) Words and terms defined in the Agreement shall have the same definition and meaning herein.

(b) "Lawsuits" shall mean those three lawsuits or actions described in paragraph 2 hereof.

(c) "Trust" shall mean Empire's (or the Receiver's or Ancillary Receiver's) entire interest in the Libbie Shearn Moody Trust as described in paragraph VII(C)(5) of the Agreement.

(d) "Insurance Policies" shall mean each and all of those certain insurance policies described in paragraph VII(C)(5)(iii) of the Agreement.

[6715] 2. Pursuant to paragraph 6 of the Second Amendment, the Receiver and Protective have evaluated changes in the condition of Empire occurring after February 1, 1974, and have

determined that the condition of Empire has changed adversely from said date so as to justify an increase in the Moratorium Amount. The Ancillary Receiver concurs in such determination. Specifically, since February 1, 1974, the following has developed:

a. On or about February 11, 1974, Shearn Moody, Jr. filed an action against the Moody National Bank of Galveston and Empire in the District Court of Galveston County, Texas, 122nd Judicial District, No. 122,034, in which Moody sought a declaration that Empire's interest in the Trust could not be transferred to Protective pursuant to the Agreement. Though a judgment was entered by the trial court denying Moody's claim, an appeal from this judgment has been taken by Moody to the Texas Court of Civil Appeals.

b. On January 14, 1975, Scott E. Manley, as attorney for Moody, made demand on Gene D. Wyatt, President of the Moody National Bank which is Trustee of the Trust, to interplead all Trust income due to Empire into the Ancillary Receivership court in Texas. The Moody National Bank as Trustee immediately acceded to the demand of Moody's attorney and filed a Stakeholder's Petition in Intervention in the Ancillary Receivership [6716] action (Case No. 198,374 in the District Court of Travis County, Texas, 53rd Judicial District) depositing therein approximately $117,000 which is the most recent semi-annual distribution from the Trustee to Empire. No judgment has been entered in said proceeding on said Stakeholder's Petition. As a result, Empire is not receiving the current income from the Trust.

c. On or about February 21, 1975, Shearn Moody, Jr. moved to file a Cross-Claim and Third Party Petition in the

Ancillary Receivership action in which he claimed that (a) under Texas law, Protective had no insurable interest in Moody's life, (b) the proceeds of the Insurance Policies held by Empire which secure the value of the Trust could not be assigned to Protective without Moody's express written consent, and (c) any such attempted assignment would be void. No judgment has been entered in said proceeding on said Cross-Claim and Third Party Petition. The Insurance Policies are an essential prerequisite of the Trust's having any value on the balance sheet of an insurance company, because if Shearn Moody were to die, the Trust which constitutes a life interest only, would be terminated.

3. As a result of these Lawsuits, the Receiver and Ancillary Receiver acknowledge that so long as they are pending, (a) the Receiver cannot transfer clear title to the [6717] Trust as required by the Agreement; (b) the Trust cannot be carried as an admitted asset in any amount on the statutory balance sheet of Empire, or of Protective if transferred to Protective; and (c) the admitted assets of Empire have been reduced by $4,367,000. This reduction in the value of Empire's admitted assets is a "change . . . in the value or nature of Empire's assets" within the meaning of paragraph 6 of the Second Amendment, and Protective and the Receiver agree that the initial Moratorium Amount shall be increased by approximately twelve percent (12%) of the Withdrawable Funds as a result of this change.

4. No assets will be transferred at this time to Protective with respect to the reinsurance of the Old National policies, and therefore the initial Moratorium Amount is due to be increased pursuant to paragraph 7 of the Second Amendment. Protective and the Receiver agree that the amount of the increase as a

result of the failure of any assets to be transferred to Protective with respect to the reinsurance of Old National policies shall be approximately three percent (3%) of the Withdrawable Funds.

5. In accordance with the foregoing, pursuant to paragraphs 6 and 7 of the Second Amendment and at the request of the Receiver and Ancillary Receiver, the intial Moratorium Amount under the Agreement for all Assumed Policies and separate accounts shall be adjusted to fifty percent (50%) of the Withdrawable Funds as of September 15, 1972 except [6718] that with reference to (a) the United Founders Treaty the intial Moratorium Amount shall be fifty percent (50%) of the Net Reserves under the Treaty as of said date, and (b) separate accounts specified in paragraph VIII (A)(2) of the Agreement the initial Moratorium Amount shall be fifty percent (50%) of the total value of those accounts as of said date.

6. As the increase in the Moratorium Amount pursuant to paragraph 6 is based on the existence of the Lawsuits, upon Final Judgments being rendered in each and all of the Lawsuits which establish without qualification that:

(a) Empire's entire interest in the Trust, as described in the Agreement, may be validly, lawfully, and irrevocably assigned to Protective free and clear of any lawful or equitable claim or restriction, and

(b) the Receiver may lawfully assign to Protective, absolutely and irrevocably, the right to receive death proceeds from the Insurance Policies in the amount of $4,350,000 (or an adjusted amount in accordance with the Agreement, as amended),

as of the end of that month in which (i) the last of such Final Judgments is rendered or (ii) death proceeds in the amount of

$4,250,000 from the Insurance Policies are received by Protective, free and clear of any adverse claim, whichever is earlier, the outstanding Moratorium Amount on each Assumed Policy and separate account in force shall be judged by [6719] twenty-four per cent of the initial Moratorium Amount for such policy or account except that for policies which convert to reduced paid-up or extended term status after June 24, 1974, such reduction shall be twelve percent (12%) of the intial Moratorium Amount. Such moratorium reduction shall be effective as of the first of the next succeeding month. As used herein, "Final Judgment" means the final judgment, order, decree or mandate of the highest appellate court (except the United States Supreme Court) to which an appeal may be taken or other recourse had by right or discretion of court, by petition or similar pleading, in any of the Lawsuits.

7. The Receiver for Old National has filed a claim against the Receiver for Empire in the amount of $800,000 which the Old National Receiver shall assign to Protective for the benefit of the Empire Fund, and which claim the Receiver has reviewed and determined to be a valid and just claim and the Receiver agrees to recommend to the Court that said claim be allowed in full (subject to vertification as to amount) on the condition that any and all payments or distributions made on account of said claim (which shall be in the same proportionate share as payments or distributions to other creditors) be immediately credited to the Empire Fund. As of the end of the month in which the first such payment or distribution on account of said claim is received by Protective it shall calculate the reduction in the Moratorium [6720] Amount in accordance with paragraph VIII.D. of the Agreement, as amended, using approximations for values not

readily availabe except at year end and treating such payment or distribution as an Empire Asset. Such moratorium reduction shall be effective as of the first of the next succeeding month.

8. Notwithstanding the Lawsuits, at closing, the Receiver shall transfer, assign and convey to Protective all of Empire's (or the Receiver's) right, title and interest to and in the Trust and with respect to the Insurance Policies shall do all things required of the Receiver by the Agreement, including, without limitation, paragraph 4 of the First Amendment.

9. If for any reason any court of competent jurisdiction determines that the Trust cannot be unconditionally and irrevocably transferred, assigned and conveyed to Protective, or invalidates or rescinds, in whole or in part, such transfer, and ownership of said Trust reverts to the Receiver (or the Ancillary Receiver), the Receiver and Ancillary Receiver each severally covenants and agrees to and shall transfer, assign and pay to Protective, immediately upon receipt thereof, free and clear of all claims of any and all creditors and of all expenses of administration, all income received by the Receiver or Ancillary Receiver on account of said Trust. If for any reason any court of [6721] competent jurisdiction determines that the death proceeds of the Insurance Policies cannot be assigned directly to Protective as contemplated by the Agreement, as amended, the Receiver and Ancillary Receiver each severally covenants and agrees to and shall transfer, assign and pay to Protective, immediately upon receipt thereof, free and clear of all claims of any and all creditors and of all expenses of administration, $4,350,000 of such proceeds, or such other amount as may be computed pursuant to paragraph 4(D)(3) of the First Amendment to the Agreement. The Receiver and Ancillary Receiver

specifically agree that the respective receiverships shall remain open for an indefinite period, and as long as may be required, so that all of said income and death proceeds may be transferred and assigned to Protective as and when received by the Receiver or Ancillary Receiver. Any and all transfers and assignments to be made pursuant to this paragraph shall be absolute and unconditional, irrespective of any right of set-off, recoupment or counterclaim the Receiver or any ancillary receiver may claim against Protective.

10. The Receiver and the Ancillary Receiver will each do all things reasonably within his power to procure as promptly as possible an unqualified victory in each of the Lawsuits and in any other lawsuits which might affect, directly or indirectly, the Trust, the Insurance or the Agreement. The Receiver and Ancillary Receiver will cooperate [6722] fully with Protective in the conduct of the Lawsuits and such other lawsuits and will not enter into any settlement negotiations nor settlement agreement respecting any of such Lawsuits without the express written approval of Protective.

11. The effective date of the Agreement shall be January 1, 1975, provided that the Receiver transfers all of the assets and policies due to be transferred to Protective pursuant to the Agreement and this Agreement to Effectuate Treaty and meets all of the conditions of the Agreement, as amended (except those relating to the Trust and the Insurance), on or before April 10, 1975. If the Receiver is unable to make said transfer of all of the assets and policies and meet all of said conditions on or before April 10, 1975, the Effective Date shall be the first day of the month in which said transfer is complete and all of said

conditions satisfied, or such earlier date as may be fixed by Protective.

12. It is expressly understood and agreed that Protective's agreement to reinsure as provided herein is made in consideration of the covenants and agreements of the Receiver and Ancillary Receiver made herein, and specifically, but without limitation, the adjustment to the Moratorium Amount made pursuant to paragraph 6 of the Second Amendment, and that without all of the covenants and agreements of the Receiver and Ancillary Receiver contained herein Protective [6723] would not reinsure the Assumed Policies pursuant to the Agreement, if at all, until all of the conditions of the Agreement, as amended, were met.

13. The Receiver expressly acknowledges that Protective has the right under the Agreement to file a claim against the Empire receivership estate on behalf of all policyholders against whose policies and contracts any moratoriums have been placed in the amount of the total amount of all such moratoriums. The Receiver further acknowledges that such a claim, when filed, will be a valid and just claim and that the Receiver will recommend that it be allowed in full (subject to verification that it is correct as to amount) and paid, provided that such payment shall be made after payment has been made to other creditors, whose claims are allowed, in proportion to the Benefits accorded policyholders under this Agreement as amended and as herein effectuated and that such payment shall not unlawfully discriminate against other creditors whose claims are allowed.

14. This Agreement to Effectuate Treaty is subject to approval of the Court. The Closing Date shall be two days following the date on which this Agreement to Effectuate Treaty may be

approved by the Court. Closing shall take place at 10:00 A.M. in the Board of Directors room of Protective.

15. Any and all disputes or differences between the contracting parties arising under or relating to this Agreement to Effectuate Treaty shall be submitted to arbitration [6724] in accordance with paragraph XVII of the Agreement. Said paragraph XVII is specifically incorporated herein just as if retyped and set out fully herein.

16. This Agreement to Effectuate Treaty shall inure to the benefit of and be binding upon the successors and assigns of Protective and the Receiver and the Ancillary Receiver.

17. All prior or contemporaneous agreements and representations relating to effectuation of the Agreement are merged into this Agreement to Effectuate Treaty, which, together with the Agreement, constitutes the entire contract between the parties. No amendment or modification hereof shall be of any force or effect unless in writing and signed by the parties.

18. This Agreement to Effectuate Treaty shall be governed by and construed and enforced in accordance with the laws of the State of Alabama, except that it is agreed that the provisions of paragraph 15 hereof, relating to arbitration of disputes hereunder, shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

19. Nothing herein, express or implied, is intended, or shall be construed, to confer upon or give any person, firm or corporation, other than Protective, Empire and the Receiver and the Ancillary Receiver, any rights or remedies under or by reason of this Agreement to Effectuate Treaty.

[6725] IN WITNESS WHEREOF, the parties hereto have

caused this instrument to be executed as of this .... day of April, 1975.

CHARLES H. PAYNE

Charles H. Payne, as Receiver for Empire Life Insurance Company of America

ATTEST:

W. C. Brannon
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

Wm. J. Rushton
President

The undersigned Ancillary Receiver, on behalf of him and his successors, concurs in all of the agreements and covenants contained in paragraphs 9 and 10 hereof and shall otherwise be bound hereunder in accordance with the provisions hereof.

HERBERT CROOK

Herbert Crook, Ancillary Receiver for Empire Life Insurance Company of America, State of Texas

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-428

SHEARN MOODY, JR.,
Petitioner,

vs.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE, Commissioner of Insurance and Receiver of Empire Life Insurance Co. of America,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

JAMES W. WEBB
WEBB & CRUMPTON
122 South Hull
Montgomery, Alabama 36104
Attorneys for Respondent, Charles H. Payne, Commissioner and Receiver of Empire Life Insurance Company of America

DRAYTON NABERS, JR.
CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
1900 First National-Southern Natural Building
Birmingham, Alabama 35203
Attorneys for Respondent, Protective Life Insurance Company

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

Table of Authorities

Statutes:

Cases:

Treatise:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. .....

SHEARN MOODY, JR.,
Petitioner,

vs.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE, Commissioner of Insurance and Receiver of Empire Life Insurance Co. of America,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

INTRODUCTION—RELATED LITIGATION

The efforts of the Petitioner, Shearn Moody, Jr., to prevent the liquidation of the Empire Life Insurance Company of America and the reinsurance of its insurance policies has produced a virtually never-ending stream of litigation. It has resulted in findings of civil and criminal contempt against Moody. *See Ex parte Shearn Moody, Jr.*, — Ala. —, — So.2d —, 11 A.B.R. 2192 (August 19, 1977) (criminal contempt); *Moody v. State ex rel. Payne*, — Ala. —, — So.2d —, 11 A.B.R. 2555 (Sept. 9, 1977 (civil contempt). In none of it has Moody been successful.

The stream is presently reaching this Court with Moody petition numbers two (No. 77-428) and three (Pet. filed 10-18-77). Moody's first petition for writ of certiorari (No. 76-1895) was denied by this Court on October 3, 1977. Citations of some of the reported decisions in this litigation appear below:

Moody v. State, ex rel Payne, 295 Ala. 299, 329 So. 2d 73 (1976);

Moody v. State, 520 S.W.2d 452 (Tex.Civ.App.—Austin 1975);

Empire Life Ins. Co. v. State, 492 S.W.2d 366 (Tex.Civ. App.—Austin 1973);

Moody v. Crook, 520 S.W.2d 958 (Tex.Civ.App.—Austin 1975);

Moody v. Jones, 519 S.W.2d 536 (Tex.Civ.App.—Austin 1975);

Day v. State, 489 S.W.2d 368 (Tex.Civ.App.—Austin 1972, n.r.e.);*

Moody v. Moody Nat'l Bank, 522 S.W.2d 710 (Tex.Civ. App.—Galveston 1975, n.r.e.);

Moody v. Texas, 538 S.W.2d 158 (Tex.Civ.App.—Waco 1976, writ ref'd n.r.e. 1977).

---

* Indicates denial of review by the Texas Supreme Court upon a finding of "no reversible error" (n.r.e.).

STATEMENT OF THE CASE

1. Events Leading to the Reinsurance Treaty.

On June 29, 1972, Hon. John G. Bookout, then Commissioner of Insurance of the State of Alabama, obtained an order from the trial court appointing him receiver of Empire Life Insurance Company of America ("Empire") (R. 1016-7). As Empire was an Alabama corporation, the receivership proceeding in Alabama became the domiciliary or main receivership proceeding. Thereafter, the District Court of Travis County, Texas, appointed Tom McFarling, ancillary receiver in Texas, to safeguard Texas assets of Empire in Texas (R. 5887-8).

After more than a year of study and efforts at rehabilitation of Empire, the Insurance Commissioners of the States of Alabama, Arkansas, Montana, Nebraska, Oklahoma, and Texas met in Helena, Montana, on August 29, 1973, to consider whether efforts at rehabilitation should continue or whether the domiciliary receiver should seek to reinsure Empire's policies with a solvent company and liquidate Empire. The commissioners determined unanimously that further efforts at rehabilitation would be hazardous to Empire's policyholders and resolved that the Alabama Receiver advertise for solvent insurance companies to submit reinsurance proposals (R. 1367-8). The Receiver then sought and received approval from the trial court to solicit reinsurance proposals for Empire. Three formal bids —from Protective, Banker's Union Life Insurance Company and Mutual Savings Life Insurance Company—were received (R. 1698). In addition, petitioner, Moody,[1] and others presented plans for rehabilitation (R. 3983, 1698).

Following receipt of the bids, the Texas ancillary receiver employed Dr. A. C. Olshen, an eminently qualified and fully in-

---

[1] Moody was formerly the controlling stockholder of Empire and claims to be a creditor of it.

dependent actuary and reinsurance specialist, to study the bids and to recommend which one, if any, should be accepted by the domiciliary receiver (R. 2104-6). Dr. Olshen studied the proposals in depth and collected and analyzed voluminous data on Empire, its policies and financial condition (R. 2107-9, 2116, 2138, 2151). The insurance commissioners met with Dr. Olshen and discussed each bid with the representatives of the respective companies (R. 2107-14). Following this session, the six insurance commissioners and Dr. Olshen unanimously recommended that the Protective proposal be accepted, provided that Protective agree to certain amendments to provide the policyholders greater protection (*Id.*). Each of these amendments was negotiated with Protective and incorporated into the Treaty (*Id.*).

2. **The Libbie Shearn Moody Trust.**

Moody was bequeathed a ⅛th life interest in the income of the Trust by his grandmother, Libbie Shearn Moody (R. 5084). In 1963, Moody assigned ⅖ths of his ⅛th interest to Empire (*Id.*). The interest was initially valued at $5,813,440, but in 1965, with no intrinsic change in the value of the Trust, Empire increased its carrying value to $14,213,440 (R. 5086).

The corpus of the Trust (Empire's interest is an interest in income only for Moody's life) consists of 9,949,585 shares of the common stock of American National Financial Corporation of Galveston, Texas, and sundry assets valued at approximately $8,500,000 (R. 644).

At the time of the April 1974 trial, the market value of the entire corpus of the Trust was approximately $85,600,000. The *pro rata* share attributable to Empire's share (⅖ × ⅛ = 1/20) was $4,280,000.[2] Thus, if Empire had owned outright

[2] Testimony showed the market value of American National stock to be $7.75 per share (R. 2545).

the *pro rata* share attributable to its interest, its value would have been only $4,280,000. The gross income from the Trust has never exceeded approximately $234,000 per year (R. 5160, 6741). As Empire's interest was a life interest only, life insurance with premiums of about $65,000 annually was maintained on Moody's life, so the asset would not disappear upon his death (R. 2219). Thus, the net income derived from the Trust never exceeded approximately $175,000. If the Trust is valued at $4,250,000, there is an effective rate of return on the asset's net income of only approximately 4.1%, or substantially less than what a United States bond would yield.

The $4,250,000 valuation of Empire's interest in the Trust complained of by Moody was based squarely on the appraisal of the Trust by American Appraisal Company (R. 629-676. 542-4).

3. **The Necessity for a Reinsurance Treaty.**

Because of Empire's insolvency which exceeded $6,000,000 (R. 5150, 5155, 1688, 1701-2), the receivership court below was faced with four alternatives.

First, the stockholders could contribute cash or liquid assets to restore Empire to solvency. The Court below had held this option open to Moody from the inception of the receivership (R. 2128).

Second, the Court through its receiver could have nursed the company along—accepting premiums from the policyholders. Witnesses below, Bookout (Alabama Receiver), Carr (special adviser to the Receiver), Crook (Texas ancillary receiver), Cotton (Texas Insurance Commissioner), McFarling (Texas Deputy Commission), and Olshen (independent actuary), testified at length that this course could not succeed and would in all prob-

ability result in catastrophic loss to the policyholders (R. 1698-9, 1734, 5582, 5715-6, 2220, 2277, 2393-4, 3622-3, 3684, 5927, 5932, 2129-42). These witnesses testified categorically that without the infusion of outside capital to restore Empire to solvency, Empire could not be rehabilitated without undue risk to policyholders (*Id.*). There was *no* contrary testimony. Neither of the two experts called by Moody (LaMacchia and Crandall) knew anything about Empire's assets or had made any study whatever on whether rehabilitation was feasible (R. 1939, 1975, 1985, 2935-2942, 2967, 2970). The grave risks to policyholders presented by further rehabilitation prompted Judge Barber (the trial judge below) and Judge Jones (the trial judge in the Texas ancillary receivership proceeding) independently to reject this alternative.

Judge Barber:

"(b) The evidence shows that the condition of Empire is rapidly deteriorating. . . .

* * *

"(d) The Court finds it essential that the policyholders who continue to pay millions of dollars of premiums annually and who have already been subjected to the uncertainty of a receivership proceeding for over two years be reasonably assured of their status as policyholders as early as feasible. . . ."

(R. 6297-8).

Judge Jones:

"But I am going to say with whatever certainty and conviction I have, I am not going to preside over such an operation and receive a couple of million dollars a year from unknowing policyholders and in the hope that it might sometime work out. I think that is highly irresponsible. I think that suggestion is not worthy of much consideration,

because if it does not work out, certainly the receivers have no resources by which they could make anybody whole."

(R. 6729).

Third, the Court could have ordered the company liquidated without reinsurance. The ineluctable result of such liquidation would have been to exacerbate the asset-deficiency problem. Abundant evidence shows that Empire assets would bring less on liquidation than their book value (R. 1713, 1715, 2218, 2369, 2389). Straight liquidation without reinsurance also would have totally deprived the policyholders of their policies. Those policyholders who had passed insurable age or suffered health problems would be uninsurable and would not even recover their full cash value. Those who, in reliance on the procedures established by the receivership, had paid in excess of $6,000,000 of premiums after the date of receivership would not have recovered 100% return of these premiums (R. 5156).

The fourth, and the only practical alternative, was to seek bulk reinsurance with a responsible company in order to protect the Empire policyholders.

A bulk reinsurance treaty is a contract whereby one insurance company assumes the insurance policies of another company. Because the reinsuring company becomes liable on these policies and is required by statute to create reserve liabilities for the policies, the company ceding the policies must convey assets to the reinsuring company to offset the reserve liabilities. Empire, however, was insolvent and could not transfer assets equal in value to the reserve liabilities on its policies. Thus, in order for a company to reinsure Empire's policies without sustaining a loss, a contractual limitation on some policy benefits was necessary, thereby reducing the reserve liabilities on the policies.

The reason for reinsuring Empire's policies was to obtain a guarantee from a financially responsible company that full policy benefits would be paid at maturity and that withdrawable cash

values would be fully restored to the Empire policyholders in the future. During the period of receivership, policyholders had been paying approximately $3,000,000 in premiums annually to the Receiver (R. 5156). The Receiver, though receiving these premiums, was in no position to assure that the policyholders would ultimately receive the benefits for which they were paying. In fact, it became apparent during the course of the receivership that, instead of improving, Empire's condition was rapidly deteriorating, thus presenting an even greater hazard to policyholders than existed when the company was initially placed in receivership (R. 2129-41, 2393, 5587, 5590-1).

4. **The Protective Treaty.**

The Protective Treaty guaranteed payment of all death benefits and all other maturity benefits on all Empire policies (R. 4857, 4872). It placed a limitation called a "moratorium" of 35%, later increased to 50% primarily because of Moody lawsuits,[3] on all cash benefits that could be withdrawn voluntarily by Empire policyholders (R. 4871-4). These benefits include cash values for policies (the amount of cash that can be received if the policy is voluntarily surrendered for cash), loan values, and the like. The Protective Treaty provides for full payment of all cash benefits accruing after September 15, 1972, so that policyholders who continue to pay premiums are receiving full policy benefits attributable to current premiums (R. 6717).

Protective guaranteed that at the end of ten years the moratorium would be eliminated and all policy benefits would be

[3] Three per cent of the increase was attributable to Protective's additional agreement to reinsure on the terms applicable to the Empire policies a block of policies which had been ceded to Old National Life Insurance Company by Empire (R. 6717). Old National also became insolvent, but claimed that Empire remained responsible for the ceded policies.

restored to accepting policyholders (R. 4903). Protective further committed to calculate annually a ratio of Empire assets to its reserve liabilities and to reduce the moratorium as the asset-liability ratio improved (R. 4876-7).

As the Alabama Supreme Court recognized (App. at A-8), the Protective Treaty is structured so that Protective receives no profit until the moratorium has been completely eliminated and all policyholder benefits are restored to all accepting Empire policyholders not later than ten years from the effective date of the Treaty (R. 4876-4882). All profits which might accrue from Empire's assets and from premium income prior to the complete restoration of all benefits to the Empire policyholders are added to the Empire assets to improve the asset-liability ratio and thereby reduce the moratorium under the Treaty (*Id.*).

Messrs. Bookout, Carr, Carlisle, Crook and Olshen all testified that the Protective Treaty was by far the best reinsurance treaty submitted to the Receiver, that it was fair and that it was in the best interests of the policyholders (R. 1688-9, 1710, 5651, 5715, 2220, 2278, 2393-4, 2116, 2129-42). There was no contrary testimony. Indeed, the record reveals that none of Moody's witnesses had even read the Treaty (R. 1955, 2965).

5. **Approval of the Treaty by the Alabama and Texas Courts.**

The trial court approved the Protective Treaty after a three-week trial in which Moody was represented by four lawyers. The trial court found and concluded on the basis of overwhelming evidence (noted in part in parentheses): (1) that Empire was impaired in excess of $10,000,000 and insolvent in excess of $6,000,000 (R. 5150, 5155, 1688, 1701-2, 1710, 3696); (2) that further efforts to rehabilitate Empire would be useless (R. 1698-9, 2129-42, 2220, 2393-4, 2794, 3623, 5927, 5582-91); (3) that it was in the best interest of Empire policyholders for

Empire's policies to be reinsured by a reputable and solvent insurance company and that Empire be liquidated (*Id.*); (4) that the interest of the Empire policyholders could not be reasonably secured and protected in the absence of such reinsurance (*Id.*); (5) that no stockholder, including Moody, had presented a rehabilitation plan not involving substantial and undue risk to Empire policyholders (*Id.*; R. 2983, 4531); (6) that Protective had capital and surplus in excess of $25,000,000 (R. 5476); and (7) that Protective's proposal best protected the interests of Empire's policyholders, was fair, reasonable, non-discriminatory and fully in accordance with all applicable law (R. 1710; 2005-2010; 2043; 2220).

Even after the Treaty had been approved by the main receivership court after a plenary hearing, in light of Moody's demands, the Texas ancillary receiver refused to transfer to Protective the Empire assets held by him—the bulk of Empire's assets—until the Texas ancillary receivership court specifically authorized him to consummate the Treaty. Therefore, a second three-week trial commenced in the Texas ancillary receivership court to determine whether such authority should be granted. At the conclusion of the hearing, the Texas trial court concluded that there was no prudent alternative to reinsurance, and that it was in the best interests of the policyholders of Empire for the Protective Treaty to be approved (R. 6709, 6726-31). The Texas Court of Civil Appeals affirmed. *Moody v. State*, 538 S.W.2d 158 (Ct.Civ.App.-Waco 1976, writ ref'd n.r.e. (1977)).

6. **The Agreement to Effectuate.**

Following the recommendation by the insurance commissioners that the Protective Treaty be accepted, Moody filed a lawsuit in the District Court of Galveston County, Texas, claiming that the Receiver could not transfer Empire's largest asset, ⅔ths of Moody's ⅛th life interest in the income of the Libbie

Shearn Moody Trust, to Protective (R. 4913). This asset was valued on Empire's books at $4,250,000 and at that value constituted more than ⅛th of Empire's total assets (R. 5154). It was an essential part of Empire's assets for payment of policyholder obligations. It was a critical part of the consideration to be transferred to Protective under the Treaty. The intended effect of the lawsuit was to prevent the Receiver from transferring this asset to any reinsurer, thus frustrating any reinsurance plan. Because the existence of this lawsuit made it impossible to implement Protective's reinsurance treaty in accordance with its terms, the Receiver and Protective executed a second amendment to the Treaty, which provided for interim administration of Empire's assets and policies by Protective pending disposition of the Galveston lawsuit and for upward adjustment of the moratorium if during such period Empire's financial condition deteriorated further (R. 4913-22). Judgment has now been entered against Moody in the Texas trial court, affirmed by the Court of Appeals, and writ of error was denied by the Supreme Court of Texas. *Moody v. Moody Nat'l Bank*, 522 S.W.2d 710 (Tex.Civ.App.-Galveston 1975).

A few days before the Texas trial judge entered his order approving the Treaty, Moody commenced another lawsuit, this one claiming that even if his interest in the Libbie Shearn Moody Trust could be transferred to Protective (as the Texas courts had already conclusively determined), Protective would not have an insurable interest in the insurance policies on Moody's life (R. 6745). As the Trust asset was merely a right to receive income for Moody's life, for it to have value to an insurance company, it had to be secured by life insurance on Moody's life in an amount equal to its carrying value. Otherwise, Moody's death would have destroyed the asset completely. The new Moody lawsuit challenging Protective's insurable interest in the life insurance securing the Trust had the same effect as the Galveston lawsuit, namely, frustrating effectuation of the intent of six insurance commissioners and the judgments of

two courts that the Protective Treaty be consummated. It made it impossible for the Receiver to transfer unencumbered title to the assets required to be transferred under the Treaty.

As a result, in order to preserve the value of the Protective Treaty to the Empire policyholders, the Receiver negotiated with Protective, and Protective agreed to an Agreement to Effectuate the Treaty, which resulted in retention of all of the guarantees originally provided by the Treaty except that the initial moratorium was increased to 50% to offset the cloud imposed by Moody's lawsuits (R. 6714-25). Protective agreed, however, to reduce the moratorium to the level it otherwise would have been immediately upon the Receiver's procuring final judgments removing the cloud on the transferability of the Trust and the insurance (R. 6718-20). The adjustment to the moratorium made in the Agreement to Effectuate was expressly authorized by the Second Amendment to the Treaty which had been written to cope with the hazards created by Moody litigation (R. 4919). Though Moody complains of the Agreement to Effectuate—for what reason we do not know, as he is not a policyholder and is unaffected by it—the simple fact of the matter is that it was a reasonable response to Moody's malicious actions. On April 24, 1975, the Alabama trial court approved the Agreement to Effectuate, rendering extensive findings and conclusions *none* of which was controverted on appeal to the Alabama Supreme Court (R. 6965-72).

ARGUMENT

I. The Decision Below Was Correct in Every Respect, and There Is No Issue Presented by the Petition Worthy of Review by This Court.

The proceedings below involved a simple state law issue—whether under the provisions of the Alabama Insurers Liquidation Act, Section 27-32-1, *et seq.* CODE OF ALABAMA 1975, the Empire Life Insurance Company of America should be liquidated and its policies reinsured with Protective Life Insurance Company pursuant to a reinsurance Treaty submitted to the trial court. After a ten-day trial at which Moody was represented by four lawyers, the court ordered Empire liquidated and its policies reinsured with Protective. As the Alabama Supreme Court found in the decision below, and as discussed above (pp. 9-10, *supra*), the elements of the Alabama Insurers Liquidation Act for liquidation and reinsurance were proved by abundant evidence (App. at A-7).

In an effort to inject a constitutional issue into the case, petitioner Moody argues here that inadequate notice was given of the proceedings below. Yet, he was a party to them and had actual notice of all material developments. He argues that the Protective Treaty is discriminatory yet he nowhere alleged in any pleading filed prior to the plenary hearing on the Treaty that it was discriminatory in any respect.[4]

---

[4] Over a year after the trial court ordered Empire liquidated and its policies reinsured with Protective, the Receiver applied to the court for approval of an amendment to the reinsurance Treaty necessitated by a cloud placed on Empire's assets by lawsuits filed by Moody (see pp. 10-12, *supra*). This amendment increased the moratorium on withdrawable cash values of policyholders, but in no way affected Moody's rights either as a claimed creditor or stockholder. In objections to the Receiver's application, Moody belatedly sought to introduce the discrimination issues argued here, but the trial court properly rejected the objections as being irrelevant to the issue presented by the application (R. 6965-72).

The plenary trial on whether Empire should be liquidated and its policies reinsured lasted ten trial days. Moody was freely allowed to raise any issue and adduce any evidence he desired. The overwhelming evidence at the hearing, however, left the trial court with no choice but to order liquidation and reinsurance (*see* pp. 9-10, *supra*).

In short, the record affirmatively shows that Moody was accorded every procedural right and that no order or judgment in the proceedings violated any of his substantive rights, state or federal.

We turn now to Moody's arguments made in support of his petition.

II. All of Moody's Arguments Are Without Merit.

A. Moody's arguments of unlawful discrimination are without merit.

Moody's first argument is that the Alabama Supreme Court erroneously held that Moody lacked standing to attack the trial court's approval of the reinsurance agreement. This contention is erroneous. The Alabama Supreme Court did not hold that Moody lacked standing to attack the approval, but rather that Moody had not properly raised in the trial court the issues he argued in the Alabama Supreme Court and argues here relating to alleged discrimination against policyholders and creditors, and thus he could not argue those issues for the first time on appeal (App. at A-5). The application of this principle by the Alabama Supreme Court was in accord with indelibly established authority in Alabama.[5] In any event, the

[5] *E.g., Fountain v. Vredenburgh Sawmill Co.*, 279 Ala. 68, 70, 181 So. 2d 508 (1965); *Priestwood v. Ivey*, 275 Ala. 336, 154 So. 2d 121 (1963).

Alabama Supreme Court, in fact, did consider and decide Moody's discrimination contentions on their merits and found that they were not supported by the facts. Specifically, the Court held:

> "Had he properly asserted this standing, nevertheless the reinsurance agreement does not appear discriminatory. The policyholders, some forty thousand in number, result in part from acquisitions and mergers of many insurance companies with Empire, and they represent many different insurance plans. The reinsurance plan contains provisions which accommodate the various policy distinctions. To be sure, all of the policies are not alike, and the law does not require that they be treated alike. Different classifications based upon substantial differences are not unlawful discrimination. *State v. Pure Oil Co.*, 256 Ala. 534, 55 So.2d 843 (1951); *Carpenter v. Pac. Mut. Life Ins. Co.*, 10 Cal.2d 307, 74 P.2d 761 (1937); affirmed *Neblett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182 (1938)." App. at A-5-6.

The discrimination issues were raised and tried by Moody in the trial on approval of the Treaty in the Texas ancillary receivership court. The Texas Court of Appeals specifically discussed the issues and held:

> "The appellants assert a number of reasons why they say the agreement establishes unlawful discriminatory preferences among Empire's policyholders and creditors. We overrule these contentions.
>
> . . . The appellants' argument is erroneously based upon the premise that all Empire policies are alike and must therefore be treated identically in the reinsurance contract. The record shows that the policyholders come from many different companies with many different plans and policies, and it supports the determination that treating the

different policyholders identically in the reinsurance plan and ignoring the various policy distinctions would result in unfair discrimination. Rather, the agreement identifies each unusual or unique group and treats it with special provisions formulated to produce equitable benefits for all. It is axiomatic that a different classification and treatment of persons based on real and substantial differences between them is not per se unlawful discrimination. See 12 Tex.Jur.2d 458, Constitutional Law, § 111. Such different treatment is often necessary, as it is here, to *avoid* unlawful discrimination.

* * *

Obviously, policyholders who accept reinsurance and the eventual restoration of all policy benefits which come with it are treated differently from those who reject. But every policyholder has his choice and makes it voluntarily. At any given point in time all policyholders are treated precisely the same in relation to the moratorium. Different treatment as a result of a voluntary election can hardly be classified as arbitrary or unfair discrimination. In any event, the plan provides that Protective will transfer to the receiver assets equal in value to the reserve liability for every policy of every rejecting policyholder less the moratorium amount on each such policy. The Receiver can then pay this amount to the rejecting policyholder. This payment approximates the initial value of the agreement to policyholders who accept reinsurance, and thus produces equal treatment of accepting and rejecting policyholders as closely as it can be done.

In addition to the terms we have cited for payment of claims of rejecting policyholders, the agreement provides for the receiver to retain an additional $2 million for payment of the claims of other creditors which have not been assumed by Protective. Under the testimony, this fund is

sufficient to treat all such claims equitably. There is no discrimination."

Moody v. State, 538 S.W.2d 158, 159-60 (Ct.Civ. App.-Waco 1976).

Moody tries to contend that the discrimination issues were properly raised in the trial court. They were not. Prior to the approval of the Treaty, neither Moody nor any of his lawyers, in any pleadings or statement during the three-week trial, indicated that it was Moody's contention in any respect that the Treaty might result in any unlawful discrimination. In fact, it is only by digging through various omnibus exhibits that counsel for Moody can come up with evidence that he was possibly a creditor of Empire and therefore might have standing to assert that the Treaty discriminated against creditors.

Moody argues that the Alabama Supreme Court deprived him of the right to "participate in and object to [the] activities of a receiver in a receivership proceeding." (Ptn. at 18-19). Nothing could be further from the truth. Moody was allowed to intervene in the proceeding below, and at the hearing on the approval of the Protective Treaty was represented by four lawyers who were allowed to adduce any evidence and try any issue which they desired. They simply did not raise the discrimination issues Moody sought to argue to the Alabama Supreme Court.

Even if this Court were to consider Moody's discrimination arguments on their merits, it would find that of the eleven aspects of the Treaty claimed to be discriminatory, in ten (those discussed in sub-parts 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Part I.B. of Moody's petition) the alleged discrimination is solely against policyholders or agents of Empire, and it is absolutely undisputed that Moody was never a policyholder or agent of Empire. Thus, under the well-established doctrine that one party will not be allowed to assert the constitutional rights of

another, these arguments are to be rejected. *See Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 1318, 33 L.Ed.2d 165 (1962); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1965).

With respect to sub-part 2 of Moody's first argument, it is argued that there was unfair discrimination against creditors because a $2,000,000 fund retained by the Receiver to pay creditors' claims is allegedly inadequate for this purpose. The testimony in the trial court proves that this contention is erroneous as a matter of fact (R. 1716, 2136, 5637), and the Alabama Supreme Court explicitly found that "The evidence is uncontroverted that the [two million dollar fund] is sufficient for equitable payment of [creditor] claims" (App. at A-9).[6] The Texas Court of Appeals made an identical finding. *Moody v. State*, 538 S.W.2d 158, 160 (Ct.Civ.App.-Waco 1976).

Moody argues that he should be able to assert the rights of the policyholders as their "appropriate representative" (Ptn. at 19-20). It is sufficient to note that Moody's interests and those of the Empire policyholders are diametrically opposed. There is no more inappropriate representative of the policyholders' interests than Moody. The insurance commissioners, who sought to protect the interests of the policyholders, found it imperative that the policies be reinsured (*see* pp. 3, 5-7, *supra*). This position was directly antagonistic to Moody's. Moody, a controlling stockholder of Empire, wanted Empire released from receivership and returned to the control of the stockholders. In fact, the entire history of the Moody-Empire-Protective litigation chronicles Moody's disdain and contempt of the interests of policyholders (*see* R. 6965-72).

---

[6] Moody's second argument (Ptn. at 36-7) that he did not have notice of the "hearing at which to question the adequacy of the [$2,000,000] fund" is frivolous. He had notice of the hearing and had four lawyers represent him at it. They simply did not attempt to prove (as indeed they could not have proved) that the fund was in any way inadequate.

B. Moody's argument of insufficient notice is without merit.

Moody's argument that insufficient notice was given to Empire's policyholders and creditors in connection with the approval of the reinsurance agreement is without merit on a number of grounds. In the first place, Moody had actual notice of every hearing in the court below and was represented by four separate attorneys at the plenary hearing on Protective's Treaty. Second, Moody is not and has never been a policyholder of Empire, and thus has no standing to complain of any alleged inadequate notice to the policyholders. Third, Moody did not argue in the court below that there was inadequate notice of the plenary hearing on the reinsurance agreement. His sole argument in the court below was that there was inadequate notice to policyholders of the proposed application for approval of the Agreement to Effectuate which made adjustments in the Treaty in light of lawsuits filed by Moody to destroy it.

In any event, adequate notice was given to all parties of the proceedings below. Empire's stockholders were notified by mail of the plenary hearing. Notice by publication was given to policyholders and creditors. Moreover, the approval of the Protective Treaty did not deprive any policyholder of any right whatsoever. Upon Empire's becoming insolvent, the policyholders had a single right under state law—and that was to file a claim as a creditor against the Receiver for breach of the insurance contract. Such claims would be for the amount of the policies' cash values, and the policyholders would share *pro rata* with other creditors in the company's assets. 19 Appleman, *Insurance Law and Practice* § 11.061 at 672. Every policyholder had this right before the treaty was approved and became effective, and every policyholder had the right following it. The result of the hearing on the reinsurance Treaty was the approval of a much more attractive option whereby the Empire policyholders could continue their life insurance protection under their policies in lieu of filing a claim for breach of contract.

Thus, far from depriving the policyholders of anything, the proceedings below resulted in availing them of an additional opportunity to transfer their policies to a solvent established company instead of filing a claim against the receiver.

Seen in this light it is abundantly clear that *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972), and *Goldberg v. Kelly*, 397 U.S. 274, 90 S.Ct. 1011 (1970), have no application here. No one was deprived of any constitutionally protected right in the proceedings below. *Fuentes* involved the taking of tangible personal property without a hearing, and *Goldberg* involved the summary deprivation without a hearing of what this Court characterized as "the very means by which to live." 90 S.Ct. at 1018. Thus, this Court in *Goldberg* distinguished cases of blacklisting a government contractor, discharging an employee, and denying a tax exemption as not involving cases where the deprivation created a "situation" which becomes "immediately desperate." *Id.* Certainly here where the outcome of a proceeding provides an additional opportunity for Empire policyholders, it cannot be successfully argued that the policyholders have been deprived of tangible personal property or the very means by which to live or any other property right subject to constitutional protection.

With respect to creditors, as has already been pointed out, a fund was retained for equitable payment of all their claims (p. 18, *supra*).

C. **Moody's argument on the insolvency issue is without merit.**

Moody argues that he was denied constitutionally protected rights by the failure of the Alabama Supreme Court to review the trial court's finding of fact that Empire was insolvent in excess of $6,000,000. Empire's insolvency was conclusively determined by the trial court's order of June 29, 1972. Moody

accepted this order and made no appeal from it, although an appeal was expressly authorized by Title 28A, § 622(5), Code of Alabama 1940 (Recomp. 1958), as amended. Thereafter, the issue was solely whether efforts at rehabilitation should continue or whether Empire's business should be reinsured and its affairs liquidated. The pleadings and proceedings in the trial court make this clear (R. 6708, 1224-8, 1651-3). The court time and again reiterated that this was the issue to be tried at the three-week, April 1974, hearing, and not one single time did any of Moody's four lawyers take issue with such statements (R. 1658, 2124-5, 2399). To our knowledge, from the June 29, 1972 order declaring Empire insolvent, until Moody's Rule 60(b) motion four months after the June 14, 1974 decree ordering liquidation, there is not a single Moody pleading, statement of Moody counsel, or testimony of any Moody witness which contends directly or indirectly that Empire was not insolvent. Rather, there are a multitude of statements, questions and rehabilitation plans offered by Moody or his counsel which show beyond any doubt that Moody accepted Empire's insolvency, and that the sole remaining issue insofar as Moody was concerned was whether rehabilitation efforts should continue (R. 1481, 1658, 1660-1, 3783-6, 4531-7). Moody's efforts to have the case reviewed in the Alabama Supreme Court on different issues from those which were tried were properly rejected by the Alabama Supreme Court in accord with extensive, well-settled Alabama authority (*see* n. 5, *supra*). Certainly the application of this rule in no respect denied Moody any constitutionally protected right.

D. **Moody's Argument on the Trust Devaluation Is Without Merit.**

Moody's fifth argument is that the devaluation of Empire's interest in the Libbie Shearn Moody Trust was arbitrary and denied Moody constitutionally protected rights. As discussed

above at pp. 4-5, the valuation of the Trust interest at $4,250,-000 was supported by abundant evidence, and there is certainly no constitutional principle which would require an insurance commissioner to continue to overvaluate an insurance company's assets when such would be hazardous to the best interests of its policyholders.

E. **Moody's Argument on Retroactivity Is Without Merit.**

Moody's sixth argument is that Section 748(2)(b) of the Alabama Insurance Code was applied retroactively. The simple answer to this argument is that Section 748(2)(b) was never applied by the Insurance Commissioner or any court in any proceeding or determination below. Had Section 748(2)(b) been applied, the Trust asset would have been properly valued at zero in light of Moody's lawsuit claiming that it was non-transferable. See *Moody v. The Moody National Bank of Galveston*, 522 S.W.2d 710 (Ct.App.Tex.1975).[7]

F. **Moody's Argument on Judicial Misconduct Is Without Merit.**

Moody's arguments with respect to the judicial conduct of the trial judge are absurd. For over five years during the protracted pendency of the case in the lower court, during which Moody has been represented by over twenty lawyers, and in spite of repeated Moody assaults upon the proceedings, William C. Barber has, without fail, treated Moody with utmost fairness. In any event, the "judicial misconduct" attack was not made in any court below and thus is to be rejected here.

---

[7] Section 748(2)(b) provides that "(2) The Commissioner shall disallow as an asset any deposit, funds or other assets of the insurer found by him after a hearing thereon:

(b) Not freely subject to . . . liquidation by the insurer at any time . . ."

(§ 27-37-4(b)(2) CODE OF ALABAMA 1975).

CONCLUSION

For all of the foregoing reasons, the Petition is due to be denied.

Respectfully submitted,

JAMES W. WEBB
WEBB & CRUMPTON
122 South Hull
Montgomery, Alabama 36104
Attorneys for Respondent, Charles H. Payne, Commissioner of Insurance of the State of Alabama and Receiver of Empire Life Insurance Company of America

DRAYTON NABERS, JR.
CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
1900 First National-Southern Natural Building
Birmingham, Alabama 35203
Attorneys for Respondent, Protective Life Insurance Company

Proof of Service

Proof of service of three copies of Respondents' Brief in Opposition to Petition for Writ of Certiorari upon all parties separately represented by counsel was filed by Drayton Nabers, Jr., a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-428

SHEARN MOODY, JR.,

Petitioner,

VS.

STATE OF ALABAMA, EX. REL. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE CO., OF AMERICA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

FRANK G. NEWMAN
NEWMAN, SHOOK & NEWMAN
A Professional Corporation
4330 Republic Bank Tower
Dallas, Texas 75201

Attorneys for Petitioner
SHEARN MOODY, JR.

SUBJECT INDEX

Page

NOW COMES Petitioner, Shearn Moody, Jr., and files his Reply to the Brief in opposition of the Respondent, State of Alabama Ex Rel Charles H. Payne, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America:

I.

THE ALABAMA SUPREME COURT ARBITRARILY DISCRIMINATED AGAINST THE ASSERTION OF THE FEDERAL CONSTITUTIONAL ISSUES RELATIVE TO THE FINDING OF EMPIRE'S INSOLVENCY.

The arbitrariness of the refusal of the Alabama Supreme Court to review the issue of the insolvency of Empire Life Insurance Company of America ("Empire") in connection with the judgment authorizing Empire's liquidation and reinsurance is evident from the record. The Domiciliary Receiver alleged that Empire was insolvent in his Petition for authority to liquidate and reinsure Empire. Intervenor,

Protective Life Insurance Company of America ("Protective") admitted at the hearing on the Receiver's Petition that insolvency was one of the issues to be resolved at the hearing in 1974 (R. 2998), and indeed, at that hearing the trial court granted the Petitioner a standing objection to every bit of evidence admitted and every ruling made (R. 1687). The trial court expressly found in its decree of June 14, 1974 granting the Receiver's Petition that Empire was insolvent. In light of the foregoing, the holding that the issue of insolvency was not properly preserved for appellate review must certainly fall.

Further, the Alabama Supreme Court expressly held in its opinion that the objections by the Petitioner to the discriminatory aspects of the Treaty of Assumption and Bulk Reinsurance were properly raised and preserved by him for appellate review since:

> " . . . the trial court trying the case under equity rules, expressly gave the parties a standing objection to 'every bit of evidence' and 'to every ruling'. In this posture we consider that the objection was timely made." (A-4)[1]

Since the Alabama Supreme Court, contrary to the Respondent's assertion, did acknowledge the Petitioner's objections to the Treaty in light of the trial court's ruling, it should have acknowledged the Petitioner's objection to the finding of Empire's insolvency contained in the same document in which his objections to the Treaty were contained. (A13-A26).

From the foregoing it is clear that the Alabama Supreme Court arbitrarily chose to find that the Petitioner had not preserved for appellate review the issue of insolvency and accordingly such arbitrary refusal on

---

[1]References to page numbers preceded by the letter "A" denotes reference to the appendix filed by the Petitioner along with his Petition for Writ of Certiorari.

the part of the Alabama Supreme Court does not bar review in this Court of the federal constitutional claims pertaining to the issue of insolvency.

II.

THE RETROACTIVE APPLICATION OF THE 1972 ALABAMA INSURANCE CODE SECTION 748 (2)(b) WHEREBY EMPIRE WAS DECLARED INSOLVENT BY VIRTUE OF A 1970 EXAMINATION REPORT DEPRIVED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF THEIR PROPERTY WITHOUT DUE PROCESS CONTRARY TO THE FOURTEENTH AMENDMENT AND IMPAIRED THEIR CONTRACTUAL RELATIONSHIPS WITH EMPIRE IN VIOLATION OF ARTICLE 1, SECTION 10 OF THE UNITED STATES CONSTITUTION.

Contrary to the assertion of the Respondent that the Alabama Insurance Commissioner did not rely upon 748 (2)(b) of the Alabama Insurance Code, it is clear from the testimony of the former Alabama

Commissioner of Insurance, John G. Bookout, in a hearing conducted in 1972 that he relied on Section 748 (2)(b) of the Alabama Insurance Code when he devalued Empire's interest in the Libbie Shearn Moody Trust.

> Q. (Petitioner's counsel) I will ask him that question. Mr. Bookout, was it your impression, when you stated, as you did, that the law requires you only to find the value of an asset to be what it could be sold for, is that your understanding?
>
> A. (Bookout) Well, I believe the law was read here. [R.224]

The Receiver's counsel had previously read into evidence Section 748 (2)(b) of the Alabama Insurance Code by which he attempted to establish that an admitted asset of an insurance company in Alabama must be subject to being liquidated in order to pay the claims of a company. (R. 212).

Furthermore, if the Alabama Insurance Commissioner was not following established statutory procedure with regard to the

devaluation of Empire's assets then his devaluation of the trust interest was clearly arbitrary and capricious since there were apparently no definitive criteria for the valuation of Empire's trust interest if the Commissioner was not in fact retroactively applying Section 748 (2)(b). As pointed out in the Petitioner's Petition for Certiorari, Commissioner Bookout had ignored the gradual program of devaluation proposed by his predecessor in office, Mr. Frank Ussery who had proposed that the $14,000,000 valuation assigned to Empire's trust interest be gradually devalued. Bookout's valuation of the trust interest at $4,250,000 was clearly a radical departure from the proposed program of gradual devaluation proposed by Commissioner Ussery, and so arbitrary as to effect a denial of due process.

III.

EMPIRE'S CREDITORS WERE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW SINCE THEY WERE NOT PROVIDED WITH NOTICE OR A HEARING AT WHICH TO DETERMINE THE ADEQUACY OF THE $2,000,000 FUND TO PAY THEIR CLAIMS AS WELL AS THE EXPENSES OF ADMINISTRATION.

As pointed out by the Petitioner, the former Commissioner of Insurance, John G. Bookout, testified to the effect that he was unaware of the basis for the selection of the $2,000,000 figure. It is also significant to note that the trial court's personal advisor, Paul Carr, also testified that:

> "As I recall, the figure was pretty much just picked out of the blue." (R. 5679).

Carr admitted that he could not recall any specific basis for the selection of the $2,000,000 figure (R. 5638-39). It is

clear therefore, that the Alabama Supreme Court erred when it concluded that there was sufficient evidence to establish the adequacy of said sum to pay the creditor's claims.

Further, as pointed out by the Petitioner in his Petition for Certiorari, the debts which Protective refused to assume under the Reinsurance Agreement are numerous and will in all likelihood consume the $2,000,000 fund set aside for the payment of creditors' claims and expenses of administration. (Pet. for Cert. pages 26-27). Unfortunately, there has been no computation of the amounts of liabilities which Protective has refused to assume and therefore the trial court had no way of knowing whether the creditors whose debts were not assumed received more or less than those whose debts were assumed by Protective. The foregoing clearly under-

scores the lack of equal protection being accorded to those creditors whose claims are not assumed by Protective and who were denied an opportunity to appear at a hearing and to contest the adequacy of the $2,000,000 fund to pay their claims.

IV.

THE FORMER ALABAMA COMMISSIONER OF INSURANCE, JOHN G. BOOKOUT, CAUSED DEFAMATORY NEWSPAPER ACCOUNTS TO BE PUBLISHED REGARDING EMPIRE IN VIOLATION OF THE ALABAMA INSURANCE CODE AND THEREBY PREVENTED EMPIRE FROM HAVING A FAIR AND IMPARTIAL RECEIVERSHIP PROCEEDING IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

One of the most important fundamental rights assured to each citizen of the United States is the protection against arbitrary and unlawful conduct by state officials and the deprivation of life, liberty or

property without the due process of law guaranteed by the Fourteenth Amendment.

In recognition of the foregoing Constitutional rights, the State of Alabama has chosen to provide in its insurance code several provisions protecting the fundamental rights afforded by the Fourteenth Amendment to those engaged in the insurance business. One such provision is Title 28A §235, entitled "Defamation", and provides as follows:

> No person shall make, publish, disseminate or circulate, directly or indirectly or aid, abet or encourage the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false or maliciously critical of or derogatory to the financial condition of an insurer or of an organization in proposing to become an insurer and which is calculated to injure any person engaged or proposing to engage in the business of insurance. (1957 p. 856, §4, approved September, 1957; 1971, No. 407 effective Jan. 1, 1972).

A violation of the Alabama Insurance Code carries with it the following penalties:

> Section 15 entitled "General Penalty"' Each willful violation of this code for which a greater penalty is not provided by another provision of this code or by other applicable laws of the state, shall in addition to any applicable described denial, suspension or revocation of certificate of authority, or license be punishable as a misdemeanor upon conviction by a fine of not more than $1,000.00 or by imprisonment in the county jail or by sentence to hard labor for the county for a period of not to exceed one year or by both such fine and imprisonment or hard labor in the discretion of the court. Each instance of violation shall be considered a separate offense.

Despite the existence of Section 235, the former Alabama Commissioner of Insurance, John G. Bookout, proceeded to violate Section 235 by leaking derogatory and malicious financial information to the Montgomery Advisor newspaper regarding a number of Alabama insurance companies, including Empire Life, which prominently

appeared on the front page of that newspaper in a series in order to create the climate whereby the commissioner of insurance appeared to have no choice but to place Empire in receivership. The following is a schedule of the malicious news leaks that appeared on the front page of the Montgomery Advisor in early 1972:

DATE	NEWSPAPER	HEADLINES
12/30/72	Montgomery Advisor	Empire Life Ins. Co. in Alabama Insolvent, Audit Shows
2/10/72	Montgomery Advisor	False Missing Record Fog Empire Life Possible Interest Conflicts Cited In Report on Empire
2/13/72	Montgomery Advisor	Mutual Recovered $1,000,000 It Paid For Notes After Bookout Filed Suit

4/5/72	Montgomery Advisor	Bookout Asks O.K. To File Suit Against Empire Life
4/7/72	Montgomery Advisor	Texas Freezes Empire Life Assets Assume Supervision
4/11/71	Montgomery Advisor	Bookout Will Decide If Empire Is Solvent Empire Gave $30,000 To Wallace Campaign
4/15/72	Montgomery Advisor	Empire Life's Subsidiary Restrained
5/28/72	Montgomery Advisor	American Benefit Life Insurance Insolvent Audit Shows
5/30/72	Montgomery Advisor	Policy Holders Face Loss In $1,000,000 Entry Missing In Roussel Ins. Firm

The release of these malicious and derogatory news stories to the Alabama newspapers in violation of Section 235 of

the Alabama Insurance Code was caused by former Alabama Commissioner of Insurance, John G. Bookout, as evidenced by deposition testimony taken in connection with several lawsuits arising out of the companies that Bookout placed in receivership in the State of Alabama.

The following excerpt is taken from a deposition taken of the Attorney General of the State of Alabama, William Baxley, September 8, 1976, and on page 52 of that deposition he was asked the following question regarding the articles which appeared in the Montgomery Advisor:

> Question:
>
> Did you release the contents of your letter to the Montgomery Advertiser? (Referring to the letter the former Texas Attorney General Crawford Martin had sent to the Alabama Attorney General Baxley concerning putting Empire Life in Receivership).
>
> Answer:
>
> No, sir, I don't believe so - judging from the tenor of that

> story, the way its written, looks like it was released by Bookout. At that time he was sniping back to me as well as me at him, and apparently he ran down with his reply. Just reading the story it looks like he was trying to get there first, saying that "I have asked Baxley to file this suit".

The preceding excerpt shows that the Alabama Insurance Commissioner under state law was leaking malicious news articles critical of the financial condition of Empire in violation of Section 235 of the Alabama Insurance Code to the press in early 1972.

Indeed, such conduct was a blatent denial of Empire's right to a fair and impartial receivership hearing as guaranteed, not only by the Fourteenth Amendment, but also by Article I, Section 13 of the Alabama Constitution which provides that " . . . right and justice shall be administered without sale, denial or delay."

The prejudicial impact of the publication of this information regarding Empire tainted the receivership proceeding and denied it the minimum that due process requires, a fair and impartial hearing.

V.

EMPIRE LIFE INSURANCE COMPANY OF AMERICA WAS DENIED A FAIR AND IMPARTIAL RECEIVERSHIP PROCEEDING IN THE STATE OF ALABAMA BECAUSE THE ANCILLARY RECEIVERS OF EMPIRE IN TEXAS AND ARKANSAS COERCED AND INTIMIDATED THE DOMICILIARY RECEIVER INTO LIQUIDATING EMPIRE.

Shortly after Empire was placed in receivership in 1972, the trial court directed the Domiciliary Receiver, John G. Bookout, to take whatever action was necessary to rehabilitate Empire and to solicit proposals for the rehabilitation of the company. Several proposals for the rehabilitation of Empire were presented, including one by Petitioner Moody. Unfortunately, the Ancillary Receivers of Empire in the states of Arkansas and Texas intimidated and coerced the Domiciliary Receiver into

rejecting all of the rehabilitation proposals and requesting the liquidation of and reinsurance of Empire. During the period in which Empire was to be rehabilitated, Mr. Clay Cotten, former Texas Commissioner of Insurance, wrote Bookout and instructed him that any rehabilitation of Empire would be unacceptable [R. 3087]. Outrageously enough, the Texas and Arkansas Ancillary Receivers also communicated their adamant opposition to the rehabilitation of Empire, not only to the Domiciliary Receiver but also in ex parte fashion to the Domiciliary Receivership Court. Such behavior is unprecedented in insurance company receiverships and was so blatantly calloused and defiant with regard to established judicial procedure that the receivership proceedings were ineradicably tainted and accordingly denied to

Empire policyholders, stockholders and creditors the minimum degree of fairness that due process requires; i.e., a full and fair hearing before an impartial tribunal.

During the liquidation proceedings conducted in Alabama in 1974, Mr. Herbert Crook, the Texas Ancillary Receiver, was asked the following questions by Mr. Webb, counsel for the domiciliary receiver:

> Q. Do you know whether or not Empire Life Insurance Company of America was placed in conservatorship prior to going into receivership?
>
> A. I don't know whether that step was taken and (R.2307) Mr. George, I believe, was appointed. Now, in view of the fact that there was pending in Alabama a court hearing to determine whether or not it should be placed in receivership in the state of its domicile, my best recollection is that the commissioner did not proceed to this step of conservation and take it over, but merely retained a supervisor in the company

to have this negative effect while the action was pending over here in Alabama. (R. 2308).

Q. Alright, Mr. Crook. Were you aware of any agreement or commitment made Odom, Cotton, or anyone else of the Texas Insurance Department with Protective Life, other than those as reflected in the original bid and the first and second amendments on file with this Court?

A. In the meeting at Las Vegas, Protective asked that the bonds that were carried in Empire's portfolio be allowed to be carried at the same amortized value in Protective's portfolio after the reinsurance agreement, rather than treating the reinsurance agreement as a sale of those bonds, which would require them to go back and put them on their books at today's market, which would be substantially lower than that, but that was something that, from my discussion with (R. 204) examiners in any department would treat them that way anyway, but Mr. Cotten gave them that commitment. There was one other commitment along the same lines, and I can't recall what it was right now.

Q. These commitments have been brought to Judge Barber's attention and anything that has been filed in this Court up until the present day, Mr. Crook?

A. I don't know, they had to do with the regulatory autority of the Department of Insurance, and I don't think Judge Barber has too much control over the regulatory authority of the State Department of Insurance of the State of Texas (R.2293).

The foregoing testimony documents discrimination as well as implies the use of threats, and intimidation by a regulatory agency and serves to document the Texas Insurance Department's utter disregard for the domiciliary receivership court which Mr. Crook constantly intimidated with his unauthorized presence throughout the entire trial.

VI.

THE COURT WAS POWERLESS TO ORDER AND FORCE THE PLAINTIFF INSURANCE COMMISSIONER TO DO ANYTHING AS THE PLAINTIFF WAS THE STATE'S FINAL REGULATORY AUTHORITY OVER INSURANCE MATTERS AND AS SUCH THE COURT WAS POWERLESS TO RENDER AN INDEPENDENT JUDICIAL DECISION OR GRANT DUE PROCESS AS REQUIRED BY THE FOURTEENTH AMENDMENT TO

THE U.S. CONSTITUTION AND HENCE THE STATE COURT JUDGMENT OR FINDING IS NULL AND VOID AND NOT ENTITLED TO FULL FAITH AND CREDIT BY OTHER COURTS.

During the proceedings before the Alabama receivership trial court, the Insurance Commissioner, John Bookout, pleaded and alleged that he alone (by Alabama Statute under the new insurance code and not the court) had the final authority to determine asset valuations and this is exactly what the receivership court held.* Commissioner Bookout as Alabama Insurance Commissioner went to Alabama legislature for statutory authority to extend his office's control over the life insurance industry and had the Alabama legislature adopt a new insurance code. Is the Alabama Insurance Code constitutional when it provides the

---

* The Court accepted in total the Insurance Commissioner's valuation of Empire Life's assets and the Court did not vary on its own any of those asset valuation findings.

Commissioner of Insurance with unbridled discretion as to the valuation of admitted assets? The Code fails to provide for prior notice or a hearing as to the reasonableness of valuations proposed by the Commssioner before they become effective.

> §745. "Assets" defined. -- In any determination of the financial condition of an insurer, there shall be allowed as assets only such assets as are owned by the insurer and which consist of:
>
> * * *
>
> (13) Other assets, not inconsistent with the provisions of this section deemed by the commissioner to be available for the payment of losses and claims, at values to be determined by him. (1965, P.1057, appvd. Aug.26, 1965; 1971, No. 407, effective Jan. 1, 1972.)

> §749. Valuation of other Secutities. (1) Securities, other than those referred to in Section 749, held by an insurer shall be valued in the discretion of the Commissioner at their market value or at their appraised value, or at prices determined by him as representing their

fair market value. *
[Emphasis added.]

The Insurance Commissioner is clearly a state official and even if he is vested with judicial powers by special interest Alabama statutes, he cannot rely on these statutes and powers to undo the civil and constitutional rights guaranteed by the U.S. Constitution to its citizens. Over 40,000 policyholders, 20,000 stockholders and numerous creditors had their property rights either partially or totally confiscated as a result of the arbitrary devaluation of Empire's interest in the Libby Shearn Moody Trust by the Commissioner of Insurance.

The Alabama receivership court authorized its receiver, John Bookout to prosecute

---

* Alabama Insurance Code effective January 1, 1972. See also Sections 745 through 753 of the Alabama Insurance Code.

petitioner, Shearn Moody, Jr., in a derivative stockholders suit (R.1066-1075) as an outgrowth of the liquidation of Empire Life by the receivership court. **Payne v. Moody, CA3-5678-D N.D. Tex.) In the receiver's action in federal court, counsel for the receiver submitted the Alabama receivership court order (R.6265-6266) showing an alleged $6,000,000 insolvency of Empire Life and alleged that Petitioner Moody was responsible for the alleged insolvency.

In his effort to prove damages in the federal court action, the receiver relied upon the Alabama receivership court judgment which devalued the Libbie Shearn Moody Trust asset of

---

** Bookout was succeeded by Charles H. Payne, as receiver for Empire and therefore substituted for Bookout as Plaintiff.

Empire Life by $10,000,000 with the stroke of a pen.

Can the Alabama receiver, who has effectively denied a defendant (Moody) due process in the Alabama state courts on asset valuations, be permitted to complain in federal court and seek to have the federal courts invoke their judicial process over a defendant's personal property, in order to enforce the previously quoted Alabama Insurance Statute, Section 759, which prevented the Alabama court from rendering an independent decision of its own on assets valuations?

Can a successor Insurance Commissioner (Bookout) undo retroactively the asset valuations of his two immediate predecessor Alabama Insurance Commissioners who had given express written approvals concerning the $14,000,000 value of Empire

asset valuation. The receivership court's finding of insolvency was based upon statutory insurance accounting principles and not on actual or real insolvency as no value or credit was given for $7,373,953.23 (5218) of non-admitted assets and $2,319,997.98 of non-ledger assets (5218) and in 1970 Empire Life had $23,712.78 of Non-admitted assets (64) and $257,654,628.00 insurance in force as of December 1971 (5271) which had a real or actual value of $6,400,000 (3313) (See Appendix A attached). If value allowed for assets which had a real value and yet for which no value was allowed such as $23,712,463.78 non-admitted assets, $6,400,000 insurance in force or $10,000,000 additional value for the Libbie Shearn Moody Trust, Empire

Life would not have been allegedly insolvent and there would have been no excuse to give Empire Life to Commissioner Bookout's friend and Judge Barber's constituent, Protective Life.

VII.

EMPIRE LIFE AND PETITIONER MOODY WERE DENIED A FAIR, IMPARTIAL, JUST AND EQUITABLE QUASI-JUDICIAL ADMINISTRATIVE HEARING BEFORE THE ALABAMA INSURANCE COMMISSIONER ON APRIL 10, 1972, AS THE COMMISSIONER WAS PREJUDICED, BIASED, UNFAIR, UNJUST, AND PARTIAL AGAINST PETITIONER MOODY AND EMPIRE LIFE AND AS SUCH EMPIRE LIFE AND PETITIONER MOODY HAD THEIR PROPERTY CONFISCATED WITHOUT BEING AFFORDED DUE PROCESS OF THE LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

During 1972 and 1973, the Alabama

Insurance Commissioner, (Bookout) went trigger-happy in placing numerous Alabama insurance companies in receivership, once his new Alabama Insurance Code had become law. In another lawsuit, depositions were taken of Charles E. Hunter, First Deputy, Alabama Insurance Commissioner (6504-6520) and John G. Bookout, the Alabama Insurance Commissioner (6527-6543) which prove that Empire Life and Petitioner Moody were denied a just, equitable, fair and impartial quasi-tribunal hearing on April 10, 1972, as required before proceeding to confiscate Empire Life from its shareholders.

Q. By Mr. Moore: (6505)

A. Mr. Charles E. Hunter (6504) [First Deputy Alabama Commissioner]

Q. I was a little confused by one of your statements, which I think you quoted Commissioner Bookout when he told you that you had this transaction up for approval and you said something to the effect, "If you can get rid of Moody, get rid of one." What does that mean?

A. The way I took it, he said if you can sell that thing and get rid of one of the Moodys, go ahead and sell the company, is the way I took it.

Q. What sort of relationship had he had with the Moodys--- is that a derogatory statement in your thing?

A. Well, the way he said it, it looked like he was wanting to get rid of of the company so that he could get rid of one of them.

Q. What would be the basis for that statement?

A. I--I really don't know what the basis was, you (6508) know, just wanted to get rid of one of them, since Empire was in recievership and his brother, Shearn was running it.

Q. And that didn't have a thing in the world to do with this company, did it?

A. No, sir. (6509)

Q. About this conversation with Mr. Bookout, in which it has been one or more times euphemistically stated "If you can get rid of a Moody, get rid of one," did he ever limit it to one Moody specifically?

A. No, sir, he just said, "if you can get rid of a Moody, get rid of one."

Q. How many did you have doing business up there?

A. Shearn Moody and Bobby Moody (6520).

Q. By Mr. Collins: (6527)

A. By John Bookout, Alabama Insurance Commissioner (6527).

Q. Did you ever make a statement to Mr. Bookout-to Mr. Hunter, Mr. Bookout, concerning Mr. Robert Moody's company? And your desire to get rid of it out of Alabama?

A. Robert Moody's?

Q. (nodded to indicated affirmative reply)

A. I have talked a lot about Shearn Moody's (6543)

Q. You don't ever recall making the statement to him, "If you can get rid of a Moody, get rid of them"?

A. Not in relation to Bobby. I didn't know Bobby Moody; I only met him one time prior to this thing coming out. And that was just to shake hands and say "Hello". (6543)

The preceding testimony documents that John Bookout, the Alabama Insurance Commissioner was prejudiced toward Empire and arbitrarily devalued Empire Life's p]rincipal asset, the Libbie Shearn Moody Trust by some $10,000,000. Clearly, Empire's policyholders, stockholders, and creditors were denied the due process of law guaranteed by the Fourteenth Amendment.

WHEREFORE, for the foregoing reasons, Petitioenr Shearn Moody, Jr. prays that his Reply to Respondent's Brief in Opposition be granted.

Respectfully submitted,

NEWMAN, SHOOK & NEWMAN
A Professional Corporation

BY: _____
FRANK G. NEWMAN

4330 Republic Bank Tower
Dallas, Texas 75201
(214) 747-9091

ATTORNEYS FOR PETITIONER

PROOF OF SERVICE

Proof of Service of three copies of Petitioner's Reply to Respondent's Brief in Opposition upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court on the same date the Reply was filed.